DOCKET

SUPREME COURT

OF THE UNITED STATES

No. 10-444
Vide 10-8116

Title	Missouri, Petitioner v. Galin E. Frye
Docketed	October 4, 2010
Lower Ct.	Court of Appeals of Missouri, Western District
Case Nos.	(WD70504)
Decision Date	March 23, 2010
Rehearing Denied	April 27, 2010
Discretionary Court Decision Date	June 29, 2010
Questions Presented	

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 27 2010	Petition for a writ of certiorari filed. (Response due November 3, 2010)
Nov 3 2010	Brief amici curiae of Connecticut and Eleven Other States filed.
Nov 3 2010	Brief of respondent Galin E. Frye in opposition filed.
Nov 3 2010	Motion for leave to proceed in forma pauperis filed by respondent.
Nov 15 2010	DISTRIBUTED for Conference of December 3, 2010.
Nov 16 2010	Reply of petitioner Missouri filed. (Distributed)
Dec 6 2010	DISTRIBUTED for Conference of December 10, 2010.
Jan 3 2011	DISTRIBUTED for Conference of January 7, 2011.
Jan 7 2011	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jan 7 2011	Petition GRANTED. In addition to the Question presented by the petition for writ of certiorari the parties are directed to brief and argue the following Question: "What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?"
Feb 10 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including April 8, 2011.
Apr 6 2011	The time to file the joint appendix and petitioner's brief on the merits is further extended to and including April 15, 2011.
Apr 15 2011	Joint appendix filed.
Apr 15 2011	Brief of petitioner Missouri filed.
Apr 21 2011	Brief amici curiae of Connecticut and 28 Other States filed.
Apr 21 2011	Brief amici curiae of Criminal Justice Legal Foundation, et al. filed.

Apr 22 2011	Brief amicus curiae of the United States filed
Apr 27 2011	The time to file respondent's brief on the merits is further extended to and including June 22, 2011
May 10 2011	The time to file respondent's brief on the merits is further extended to and including July 15, 2011
Jul 7 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed
Jul 15 2011	Brief of respondent Galin E. Frye filed
Jul 22 2011	Brief amicus curiae of Center on the Administration of Criminal Law, New York University School of Law filed
Jul 22 2011	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed
Jul 22 2011	Brief amicus curiae of The Constitution Project filed
Jul 22 2011	Brief amicus curiae of American Bar Association filed. VIDED
Aug 8 2011	SET FOR ARGUMENT ON Monday, October 31, 2011
Aug 10 2011	CIRCULATED
Aug 15 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED
Aug 15 2011	Reply of petitioner Missouri filed. (Distributed)
Aug 17 2011	Record received from Missouri Court of Appeals, Western District. (1 box)
Sep 30 2011	Record received from Supreme Court of Missouri. (1 envelope)
Oct 31 2011	Argued. For petitioner: Chris Koster, Attorney General, Jefferson City, Mo., and Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Emmett D. Queener, Assistant Public Defender, Columbia, Mo.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

RECORD
AND
BRIEFS

10-444 SEP 27 2010

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STATE OF MISSOURI,
Petitioner,

v.

GALIN EDWARD FRYE,
Respondent.

On Petition for a Writ of Certiorari
To the Missouri Court of Appeals, Western District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Contrary to the holding in *Hill v. Lockhart*, 474 U.S. 52 (1985)—which held that a defendant must allege that, but for counsel's error, the defendant would have gone to trial—can a defendant who validly pleads guilty successfully assert a claim of ineffective assistance of counsel by alleging instead that, but for counsel's error in failing to communicate a plea offer, he would have pleaded guilty with more favorable terms?

PARTIES TO THE PROCEEDING

Petitioner, State of Missouri, was the respondent below; the respondent, Galin Edward Frye, was the appellant.

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OPINIONS BELOW

The Missouri Supreme Court's June 29, 2010, Order denying petitioner's application for transfer is included in the Appendix ("App.") at A1.

The Missouri Court of Appeals April 27, 2010, Order denying rehearing or transfer is included in the Appendix at A2.

The Missouri Court of Appeals opinion, entered on March 23, 2010, is reported at *Frye v. State*, 311 S.W.3d 350 (Mo. Ct. App. 2010), and is reprinted in the Appendix at A3-A25.

The post-conviction motion court's judgment, entered November 18, 2008, is included in the Appendix at A26-A31.

JURISDICTION

The Supreme Court of Missouri denied transfer on June 29, 2010. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence.

Constitution of the United States, Amendment XIV:

> ... No state shall . . . deprive any person of life, liberty or property without due process of law . . . .

STATEMENT OF THE CASE

This petition seeks to clarify whether a defendant who pleads guilty can, contrary to the holding in *Hill v. Lockhart*, 474 U.S. 52 (1985), successfully assert a claim of ineffective assistance of counsel without showing that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial.

On August 14, 2007, the state charged Mr. Frye with the class D felony of driving with a revoked license, § 302.321, Mo. Rev. Stat. 2000. App. A4. (The offense was enhanced to felony status due to Mr. Frye's multiple prior convictions. *See* App. A37-A38.)

On November 15, 2007, the prosecutor sent a plea offer to Mr. Frye's attorney. App. A4. The state's plea offer included two options: (1) that Mr. Frye plead guilty to the felony charge in exchange for a three-year sentence, with the possibility of probation at the court's discretion, and with a further condition that Mr. Frye serve ten days "shock" incarceration in the county jail; or (2) that Mr. Frye plead guilty to a reduced misdemeanor charge in exchange for a ninety-day term of incarceration in the county jail. App. A4-A5. This plea offer was not communicated to Mr. Frye before the offer expired. App. A5-A6.

On March 3, 2008, Mr. Frye entered an "open plea," meaning that there was no plea agreement with the state. App. A6, A35. At that time, Mr. Frye stated that he understood the trial rights he was giving up by pleading guilty. App. A33-A34. Mr. Frye stated that he knew the court could impose any sentence within the range of punishment, and he assured the court that no promises or threats had been made to induce his plea. App. A34-A36.

At sentencing, the prosecutor recommended a three-year sentence, deferring to the court on the issue of probation but requesting ten days "shock" incarceration if the court were to grant probation. App. A6. The sentencing court did not grant probation, and it imposed a three-year sentence. App. A6.

After sentencing, Mr. Frye filed a post-conviction motion, alleging that counsel was ineffective for failing to tell Mr. Frye about the state's plea offer. App. A7. After an evidentiary hearing, the motion court denied the motion, concluding, *inter alia*, that Mr. Frye had failed to show prejudice, in that Mr. Frye had failed to allege or prove that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial. App. 19, A27.

In finding no prejudice, the motion court relied on the test established in *Hill v Lockhart*. App. A29. In *Hill* the Court held that, after a guilty plea, "in order to satisfy [*Strickland*'s] 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. Consistent with this test, the motion court concluded, "Because [Mr. Frye] has failed to claim, either at the evidentiary hearing or in his motion, that he would have gone to trial but for his trial counsel's actions . . . this Court finds that [Mr. Frye] is entitled to no relief." App. A31.

Mr. Frye appealed, and the state argued that Mr. Frye had failed to show prejudice as required by *Hill*. App. A15. But the Missouri Court of Appeals rejected the state's argument and concluded that the post-conviction motion court had clearly erred in applying

Hill to Mr. Frye's claim of ineffective assistance of counsel. App. A21. The court of appeals stated:

> We conclude that though prejudice may, and often will, be established by a defendant's showing that 'but for' counsel's ineffective assistance, the defendant would not have pled guilty and would have insisted on going to trial, this is not the only way prejudice can be established.

App. A17. The Court then held that Mr. Frye could show *Strickland* prejudice if he could show that but for counsel's error, there was a reasonable probability that "the result of the proceeding would have been different"—i.e., a reasonable probability that, but for counsel's error, he would have accepted the state's earlier plea offer. App. A17.

In other words, although Mr. Frye failed to allege or prove that his guilty plea was invalid (i.e., that his waiver of his right to trial was invalid), the court of appeals vacated the plea and held that Mr. Frye should be allowed to plead guilty again (without any plea offer from the state) or to stand trial.[1] App. A24.

The Petitioner, State of Missouri, seeks review of the Missouri court's decision because the Missouri court has adopted a rule that expands the right to

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[1] The court of appeals rejected Mr. Frye's claim that he should be given the benefit of the expired plea offer. App. A24. The court of appeals recognized that it was "not empowered to order the State to reduce the charge" and recommend a lesser sentence. App. A24. Mr. Frye sought transfer to the Missouri Supreme Court, arguing that the court of appeals should have ordered specific performance of the expired plea offer, and it appears that Mr. Frye intends to pursue this claim, as he has been granted an extension of time to file a petition for a writ of certiorari. *Gulin E. Frye, Applicant v. Missouri*, No. 10A312.

the effective assistance of counsel beyond its intended purpose—to protect a defendant's fundamental right to a fair trial. The Missouri court's rule conflicts with the aims (and the limits) expressed in *Strickland v. Washington* and *Hill v. Lockhart*, and it permits a defendant who has not shown a violation of the right to fair trial to "reset" the proceedings and start over. Such a rule is unfair to the state, and it hinders the orderly administration of justice.

REASONS FOR GRANTING THE PETITION

The purpose of the right to effective assistance of counsel is to preserve a defendant's right to a fair trial: "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658 (1984). This case, like *Lafler v. Cooper* (petition for writ of certiorari pending, No. 10-209), addresses a move by lower courts away from the standard set by the Court in *Strickland v. Washington*—and, thus, away from the constitutional underpinnings of the right to the effective assistance of counsel.

In *Lafler v. Cooper*, the issue is whether trial counsel's deficient advice to reject a plea agreement can result in any "prejudice" (as that term is used in *Strickland*) if the defendant is later given a fair trial. Here, the issue is similar: whether trial counsel's failing to communicate a plea offer can result in any "prejudice" if the defendant later enters a knowing, intelligent, and voluntary guilty plea.

This petition should be granted for three reasons. First, the Missouri court has expanded the right to the effective assistance of counsel beyond its protective purpose of ensuring a fair trial, and, in so doing, the Missouri court has exceeded the bounds of the constitution and effectively held that a defendant has a constitutional right to a particular plea bargain. Second, because most criminal cases are resolved through the plea process, this expansion of the right to effective assistance of counsel in guilty-plea cases has the potential to undermine the finality of convictions in a great number of cases. Third, the Missouri court's opinion directly conflicts with a decision of the United States Court of Appeals for the

Seventh Circuit in *United States v. Springs*, 988 F.2d 746 (7th Cir. 1993), and it exacerbates the wider conflict identified in *Lafler v. Cooper*.

I. By refusing to follow the test established in *Hill v. Lockhart*, and by holding that a defendant who pleads guilty can show prejudice without showing that the waiver of his right to trial was invalid, the Missouri court has expanded the right to the effective assistance of counsel beyond its constitutional basis.

In *Strickland v. Washington*, 466 U.S. 668, 684 (1984), the Court continued a long line of cases that stand for the proposition that "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." More recently, the Court observed that the right to effective assistance of counsel is bounded by the right to a fair trial: "Having derived the right to effective representation from the purpose of ensuring a fair trial, we have, logically enough, also derived the limits of that right from that same purpose." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006).

As a means of protecting a defendant's basic right to a fair trial, in *Strickland* the Court devised the now-familiar two-part test for analyzing claims of ineffective assistance of counsel. First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. Second, the defendant must, in most cases, affirmatively prove "prejudice." *Id.* at 694.

In formulating a test for prejudice, the Court noted that "[i]t is not enough for the defendant to show that the errors had some conceivable effect on

the outcome of the proceeding." *Id.* at 693. After some discussion about various standards, the Court then settled upon the following: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The Court also made plain that this test was designed to gauge the fairness of a defendant's trial: "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

When a defendant pleads guilty, of course, there is no trial, and the reliability of the verdict is generally not in question. Thus, in the wake of *Strickland*, it was not immediately apparent how claims of ineffective assistance of counsel should be resolved after a guilty plea.

The answer came in *Hill v. Lockhart*. There, the Court affirmed *Strickland*'s general framework, but the Court altered the second part of the test and held that "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59. While different from the *Strickland* test for prejudice, the *Hill* test, too, was designed, ultimately, to safeguard the defendant's fundamental right to a fair trial. The test in *Strickland* ensures that the trial itself is fair; the test in *Hill* ensures that the waiver of trial is fair. And, under *Hill*, if the waiver is not fair (e.g., if it is coerced), then the defendant's right to a fair trial is restored. In short, the "prejudice" that each test seeks to remedy is the loss of the constitutional right to a fair trial.

In Mr. Frye's case, the Missouri court adopted a test for prejudice that does not vindicate any constitutional right. Mr. Frye did not go to trial, and he never alleged that his guilty plea (his waiver of this right to trial) was not knowing, intelligent, and voluntary. Instead, Mr. Frye asserted that he was prejudiced because counsel's failing to communicate a favorable plea offer caused him to miss out on the opportunity of obtaining a lesser sentence.

In other words, Mr. Frye essentially alleged that, although he waived his right to trial with a full understanding of what he was giving up, he was nevertheless entitled to have his waiver vacated because, but for counsel's error, he could have waived his right to trial earlier and obtained better terms from the state. But this sort of prejudice—the perceived prejudice associated with a longer sentence—is not the sort of prejudice that *Hill* and *Strickland* were designed to remedy. Rather, because the right to effective assistance of counsel is derived from the fundamental right to a fair trial, any claim of ineffective assistance of counsel must be limited to curing a deprivation of that fundamental right. *See United States v. Gonzalez-Lopez*, 548 U.S. at 147. As the Court has stated:

> an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993) (footnote omitted). *See also Mabry v. Johnson*, 467

U.S. 504, 508-09 (1984) ("It is only when the consensual character of the plea is called into question that the validity of a guilty plea may be impaired."), *abrogated in part on other grounds, Puckett v. United States*, 129 S.Ct. 1423, 1430 n. 1 (2009).

The Missouri court attempted to justify its decision to reject *Hill* under the facts of this case by stating that it was merely applying the ordinary *Strickland* test for prejudice. App. A17. The Missouri court stated: "Reliance on *Hill*'s 'template' that a defendant must contend that 'but for' counsel's ineffective assistance the defendant would have insisted on going to trial as determinative of whether a defendant can establish prejudice completely ignores *Strickland*'s looser emphasis on whether a defendant can establish 'an adverse effect on the defense.' " App. A16-A17.

But, in fact, by refusing to follow *Hill*, the Missouri court ignored the basis for both *Strickland* and *Hill*—that the right to effective assistance of counsel is inseparably tied to the fairness of trial, and not merely a defendant's ability to obtain the lowest sentence. As the Court explained in *Lockhart v. Fretwell*, "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." 506 U.S. at 372. In other words, the *Strickland* test for determining prejudice is not "looser," as suggested by the Missouri court; rather, it is tailored to evaluating the fairness of a trial.

In short, Mr. Frye's claim of prejudice—that he was prejudiced by the loss of a plea offer—is not a claim of constitutional magnitude. There is no right to the lowest possible sentence, and there is no right

to a plea offer from the state. Indeed, even when a plea offer is nominally accepted by the defendant, the agreement alone does not create any constitutionally protected right. "A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest." *Mabry v. Johnson*, 467 U.S. at 507.

In sum, because claims of ineffective assistance of counsel are limited to curing errors that have infringed on the defendant's fundamental right to a fair trial, the Missouri court's reformulation of the test for prejudice—to protect a defendant's purported right to accept a plea offer—improperly expands the right to the effective assistance of counsel beyond its constitutional basis.

II. The Missouri court's expansion of the right to the effective assistance of counsel will undermine the doctrine of finality and hinder the orderly administration of justice.

In adopting a modified test for proving prejudice under the circumstances of this case, the Missouri court also overlooked the balance *Hill* struck between finality of convictions and the vindication of a defendant's rights. That modified test significantly undermines the finality of guilty pleas, and it may be used to undermine the finality of trials.

In *Hill*, in formulating the appropriate test for prejudice after a guilty plea, the Court maintained a balance between preserving the finality of reliable convictions and vindicating the invalid waiver of a defendant's right to trial. The Court stated, "we believe that requiring a showing of 'prejudice' from

defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas." 474 U.S. at 58. The Court then highlighted the importance of preserving the finality of guilty pleas:

> "Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea."

Id. (quoting *United States v. Timmreck*, 441 U.S. 780, 784 (1979)). By requiring defendants to prove that, but for counsel's error, they would not have pleaded guilty and instead would have gone to trial, the Court balanced the important interests of finality against the important interest of preserving the right to trial.

In Mr. Frye's case, the Missouri court created another "inroad on the concept of finality," but it did so without any showing that Mr. Frye's guilty plea was unfair. Mr. Frye has never alleged nor attempted to prove that his guilty plea was not knowing, intelligent, and voluntary, and he has never asserted that, but for counsel's error, he would have gone to trial. As a consequence, this new inroad on the concept of finality is made without any of the

benefits that come from vindicating the right to a fair trial.

The illusory benefit of the Missouri court's new test for prejudice is illustrated by the ineffectual nature of the "relief" granted to Mr. Frye. Mr. Frye sought to obtain the shorter sentence that he might have received under the state's expired plea offer, but the Missouri court concluded that it was "not empowered to order the State" to reinstate its offer. App. A24. Thus, the Missouri court simply vacated the reliable guilty plea that Mr. Frye had entered and stated that Mr. Frye can now "proceed to trial or plead guilty to and be resentenced for the same felony driving while revoked charge to which Frye originally entered his 'open' guilty plea." App. A244. The Missouri court acknowledged that it "may not seem a satisfactory remedy for Frye," but the court concluded that its "alternative is to ignore the merits of Frye's claim[.]" App. A24.

But the lack of any effective remedy should have led the Missouri court to recognize that, in fact, Mr. Frye had failed to demonstrate the violation of any constitutional right. If Mr. Frye had stood trial, and if it were determined that his trial was unfair, the natural remedy would be to order a new trial. Likewise, if a defendant is improperly induced to waive the right to trial, the natural remedy is to vacate the waiver (i.e. the guilty plea) and permit the defendant to stand trial. Here, because Mr. Frye did not suffer either deprivation, he is not entitled to any remedy.

Moreover, the remedy ordered by the Missouri court is unwarranted. If Mr. Frye now elects to plead guilty (as one might expect since he never alleged that he wanted to stand trial), then the finality of the

original plea was undermined for naught. And, in the process, limited judicial resources were squandered.

If, on the other hand, Mr. Frye elects to stand trial, then he has been granted a windfall that he is not entitled to under the law. Mr. Frye waived his right to trial, and there has never been any showing that the waiver was invalid. Allowing Mr. Frye to take back his waiver—without any showing that the waiver was improperly induced—gives Mr. Frye a second chance to stand trial when the state's ability to try the case might be materially prejudiced due to the passage of time.

The result is that a defendant who finds himself in Mr. Frye's place will have the ability to compare the outcome of his guilty plea to the state's initial plea offer. If the initial plea offer is more favorable, the defendant can then have the plea undone. The defendant can then demand a trial and force the state to prove its case after a considerable passage of time. This sort of conduct is not consistent with the orderly administration of justice.

Alternatively, the Missouri court's rule could encourage a defendant who learns that counsel has failed to communicate a plea offer to cause even greater waste. The defendant could elect to stand trial, gamble on receiving a lesser sentence or acquittal, and then have the trial proceedings vacated if the trial turns out worse than the state's expired plea offer. This is the type of situation that underlies the petition in *Lafler v. Cooper* (petition for writ of certiorari pending, No. 10-209), where the issue is whether counsel's deficient advice during plea negotiations can result in prejudice if the defendant is subsequently given a fair trial and

sentenced to more than the state's initial plea offer.

In sum, because there was no violation of Mr. Frye's right to a fair trial, the Missouri court erred in formulating a test that has the effect of undermining the finality of guilty pleas. The vast majority of criminal cases are resolved through the plea process, and the Missouri court's rule will inevitably impair the orderly administration of justice.

III. The Missouri court's decision conflicts with a decision of the United States Court of Appeals for the Seventh Circuit, and it presents the other half of a question that has engendered broad conflict.

The Missouri court's opinion also conflicts with a decision of the United States Court of Appeals for the Seventh Circuit. In *United States v. Springs*, 988 F.2d 746, 748-49 (7th Cir. 1993), the Seventh Circuit addressed a claim of ineffective assistance of counsel related to plea negotiations. There, plea counsel told the defendant to reject a plea offer because "the judge was likely to give him a sentence substantially lower" than the government's offer. As it turned out, when the defendant subsequently pleaded guilty not pursuant to the government's first offer, the defendant received a longer sentence. *Id.* at 749. But the court held that even assuming that counsel's advice was deficient, counsel's advice did not result in any "prejudice" because "[n]ot every adverse consequence of counsel's choices is 'prejudice' for constitutional purposes." *Id.* (citing *Lockhart v. Fretwell*, 506 U.S. at 369-70). To the contrary, because the defendant had voluntarily pleaded guilty, the fact that he received a longer sentence did not demonstrate "prejudice" because " '[u]nreliability or unfairness does not result if the ineffectiveness of

counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.' " *Id.* (quoting *Fretwell*, 506 U.S. at 372). Similarly, here, Mr. Frye has not suffered the deprivation of any fundamental constitutional right.

Although the conflict over the specific issue in Mr. Frye's case may not be widespread, it is the other half of a question that has arisen in cases where, after rejecting or missing a favorable plea offer, the defendant is accorded a fair trial (instead of a fair guilty plea). The issue in those cases is whether a defendant who receives a fair trial can nevertheless show *Strickland* prejudice from counsel's errors in plea negotiations. And like the Missouri court and the Seventh Circuit here, the courts addressing that issue have reached conflicting conclusions. Some courts confronted with that issue have granted the defendant a new trial. *See e.g. United States v. Gordon*, 156 F.3d 376, 381-82 (2nd Cir. 1998). Others have specifically enforced the forgone plea offer. *See e.g. Hoffman v. Arave*, 455 F.3d 926, 942-43 (9th Cir. 2006).[2] A third group has crafted compromise remedies. *See e.g. Boria v. Keane*, 99 F.3d 492, 498-99 (2nd Cir. 1996) (ordering defendant's sentence to be reduced to the time he had already served and defendant discharged because that period was more than double what he would have served under the plea offer); *Beckham v. Wainwright*, 639 F.2d 262,

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[2] In *Arave v. Hoffman*, 552 U.S. 1008 (2007), the Court granted certiorari, in part, to address this issue. The Court ordered the parties to answer the following question: "What, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?" *Id.* But, ultimately, the case was dismissed as moot. *Arave v. Hoffman*, 552 U.S. 117 (2008).

267 n. 7 (5th Cir. 1981) (permitting defendant to choose between reinstatement of the original plea or a new trial). And, finally, some courts have held that no remedy is appropriate because there is no prejudice if the defendant receives a fair trial. *See e.g. State v. Greuber*, 165 P.3d 1185, 1188-91 (Utah 2007).

Currently, the issue of whether "prejudice" can be shown after the defendant receives a fair trial is pending before the Court in *Lafler v. Cooper*, No. 10-209. Mr. Frye's case represents the other half of that controversy—just as *Hill* represented the other half of the question answered by *Strickland*—as it raises the analogous question of whether "prejudice" can be shown after a fair and reliable guilty plea. The issues combine to pose a serious question that the Court should answer: whether a defendant can base a claim of ineffective assistance of counsel on a superseded plea offer.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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In the Supreme Court of Missouri

SC90856
WD70504

May Session, 2010

Galin E. Frye,
Appellant,

vs. (TRANSFER)

State of Missouri,
Respondent.

Now at this day, on consideration of the appellant's application to transfer and respondent's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said applications be, and the same are hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session, 2010, and on the 29th day of June, 2010, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 29th day of June, 2010.

/s/ Thomas F. Simon Clerk

_____ D.C.

Missouri Court of Appeals
WESTERN DISTRICT

April 27, 2010

IMPORTANT NOTICE

To: All attorneys of Record

Re: GALIN E FRYE #514200 (24.035), APPELLANT

vs.

STATE OF MISSOURI, RESPONDENT

WD70504

Please be advised that Respondent's motion for Rehearing is **OVERRULED** and motion for transfer to Supreme Court is **DENIED**. See Rule 83.04.

/s/ Terence G. Lord

Terence G. Lord
Clerk

cc: EMMETT D. QUEENER (573) 882-9468
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In the
Missouri Court of Appeals
Western District

GALIN E. FRYE,	)	
	)	
Appellant,	)	WD7504
	)	
v.	)	OPINION FILED:
	)	March 23, 2010
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of
Boone County, Missouri
The Honorable Clifford E. Hamilton, Jr., Judge

Before Division Four: THOMAS H. NEWTON, Chief Judge, JOSEPH M. ELLIS, Judge and CYNTHIA L. MARTIN, Judge.

Galin Frye appeals the motion court's denial of his Rule 24.035 motion for post-conviction relief following an evidentiary hearing. Frye contends that the motion court clearly erred in denying his motion because he received ineffective assistance of counsel as a result of trial counsel's failure to inform him of a plea offer made by the State. The plea offer would have permitted Frye to plead to the amended charge of misdemeanor driving while revoked instead of going to trial on the charge of felony driving while revoked. Frye claims he would have taken the plea offer amending his charge to a misdemeanor had he known about the offer. Frye thus contends that his subsequent entry of an "open" guilty plea to the

felony charge of driving while revoked was unknowing, involuntary, and unintelligent. We reverse and remand.

Factual and Procedural History

On August 14, 2007, the State charged Galin Frye ("Frye") with one count of the class D felony driving while his driving privilege was revoked in violation of Section 302.321.[1] Frye had previously been convicted of three misdemeanor driving while revoked charges on May 21, 2004, April 20, 2006, and February 10, 2006.

Frye's preliminary hearing was scheduled for November 9, 2007. Frye contacted counsel the day before to inform him that he could not attend the hearing. Trial counsel appeared on Frye's behalf and received a continuance of the preliminary hearing to January 4, 2008. Frye had no scheduled court appearances between November 9, 2007, and January 4, 2008.

On November 15, 2007, the State sent Frye's trial counsel a written plea offer ("Offer"). The Offer was file stamped as received in trial counsel's office on November 19, 2007. The Offer stated:

> My recommendation is a[sic] follows: 3 and defer, on the felony with 10 days "shock" in the Boone County Jail; **OR** 90 days to serve on an amended misdemeanor in the Boone County Jail.
>
> I am going to subpoena witnesses for the preliminary hearing on January 4, 2008. I will need to know if Mr. Frye

[1] All statutory references are to RSMo 2000 as supplemented unless otherwise indicated.

> will be waiving [sic] to preserve the offer by noon on December 28, 2007.

Trial counsel's highlighting of, and other pen marks on, the written Offer, coupled with trial counsel's testimony at the post-conviction hearing, confirm that trial counsel actually received and read the Offer approximately one week after it was mailed.

Frye testified at the post-conviction hearing that he had no knowledge of the Offer until after he was convicted, sentenced, and incarcerated.[2] At the time of the Offer, Frye lived in St. Louis, Missouri. Trial counsel had Frye's mailing address. Frye testified at the post-conviction hearing that during the Offer window he did not see or speak with trial counsel and that his mailing address did not change.

Trial counsel testified at the post-conviction hearing that trial counsel could not recall whether he had communicated the Offer to Frye. Trial counsel testified that there was no correspondence in his file to indicate any effort was made by his office to mail the Offer to Frye. Trial counsel could not recall speaking with, seeing, or ever attempting to contact Frye during the Offer window of November 15, 2007, to December 28, 2007.

On January 4, 2008, Frye appeared for his continued preliminary hearing. Trial counsel, who was unable to attend, placed a note in Frye's file for the docket attorney covering the hearing. The note stated "-Probably should-Talk to him, from St. Louis, rec is tagged-Also has new misd, (go ahead & enter) WAIVE." Trial counsel interpreted his note during

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[2] Frye testified at the post-conviction hearing that his post-conviction counsel sent him a copy of the Offer while he was incarcerated.

the post-conviction hearing. He testified that his note indicated that the Offer was included in the file and should be discussed with Frye. By this time, however, the Offer had expired. Frye testified that the docket attorney did not advise him of the expired Offer at the time of the preliminary hearing. Trial counsel interpreted his note's reference to "new misd" as referring to the fact that Frye had received another charge. Frye testified during his post-conviction hearing that he received another misdemeanor driving while revoked charge on December 30, 2007.[3] This was two days after the Offer expired. It is unclear how trial counsel knew of Frye's new charge, though we surmise Frye must have had a discussion of some sort with his counsel between December 30, 2007, the date of the new charge, and January 4, 2008, the date of the preliminary hearing for which trial counsel had prepared the hand written instructions for the docket attorney.

On March 3, 2008, Frye entered an "open" guilty plea to the class D felony of driving while revoked. The new charge Frye received on December 30, 2007, was not addressed during the guilty plea hearing. The State recommended a three year sentence, deferred, with ten days shock time. This was identical to the first of the two options that had been described in the Offer. The sentencing court did not accept the State's recommendation. Frye was sentenced on May 5, 2008 to three years imprisonment in the Missouri Department of Corrections.

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[3] The record does not reflect where the new charge was received.

On June 9, 2008, Frye filed a *pro se* motion seeking post-conviction relief pursuant to Rule 25.035 ("Motion"). Frye's Motion alleged that trial counsel was ineffective for failing to communicate the Offer. Following an evidentiary hearing, the motion court denied Frye's Motion. This appeal follows.

Standard of Review

Appellate review of the disposition of a motion filed under Rule 24.035 is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. Rule 24.035(k); *Krider v. State*, 44 S.W.3d 850, 856 (Mo.App. W.D.2001). The trial court's "findings and conclusions are clearly erroneous only if, after reviewing the entire record," we are left with a "definite and firm impression that a mistake has been made." *Id.*

Analysis

In Frye's sole point on appeal, he contends that the motion court clearly erred in denying his Motion following an evidentiary hearing because his guilty plea was unknowing, involuntary, and unintelligent. Frye contends that trial counsel failed to inform him of the Offer. Frye contends that had he known of the Offer he would have accepted the prong of the Offer which would have permitted him to plead to an amended misdemeanor charge of driving while revoked, and that he would not have entered an "open" guilty plea to the class D felony charge of driving while revoked.

A guilty plea must be a "voluntary expression of the defendant's choice, and a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences." *State v.*

Roll, 942 S.W.2d 370, 375 (Mo. banc 1997). Once a guilty plea is entered, all claims that counsel was ineffective are waived, "except to the extent that the conduct affected the voluntariness and knowledge with which the plea was made." *Worthington v. State*, 166 S.W.3d 566, 573 (Mo. banc 2005).

The plea process in a criminal adjudication warrants the same constitutional guarantee of effective assistance of counsel as trial proceedings. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). To prevail on an ineffective assistance of counsel claim following a guilty plea, Frye must show by a preponderance of the evidence that: (1) trial counsel's performance was deficient because he failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise in similar circumstances; and (2) the deficient performance prejudiced Frye. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Simmons*, 955 S.W.2d 729, 746 (Mo. banc 1997). If either the performance prong or the prejudice prong is not met, then we need not consider the other, and Frye's claim of ineffective assistance of counsel must fail. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

Performance Prong

To satisfy the performance prong, Frye must show by a preponderance of the evidence that trial counsel's failure to inform him of the Offer fell below an objective standard of reasonableness. Reasonableness is looked at in light of all of the circumstances, and the prevailing professional norms at the time of the alleged error. *Strickland*, 466 U.S. at 688-89, 104 S.Ct. 2052. Frye must overcome the presumption that any challenged action was sound trial strategy,

and that counsel rendered adequate assistance of counsel, making all significant decisions in the exercise of professional judgment. *Id.* at 689-90, 104 S.Ct. 2052.

"Failure of defense counsel to communicate a plea offer ordinarily constitutes deficient performance" of counsel. *Members v. State*, 204 S.W.3d 210, 212 (Mo.App. W.D.2006) (citing *State v. Colbert*, 949 S.W.2d 932, 946 (Mo.App. W.D.1997)). In *Members*, defendant contended his guilty plea was involuntary and that he received ineffective assistance of counsel because counsel had not communicated a plea offer. *Id.* at 211. The motion court did not permit the defendant an evidentiary hearing. Id. We concluded that the failure to communicate a plea offer satisfies the performance prong of Strickland. *Id.* at 213. Because the motion court had not permitted the defendant an evidentiary hearing to determine whether, in fact, the offer had not been communicated, we reversed and remanded the case for an evidentiary hearing. Id. In Colbert, defendant claimed he was not advised of the State's plea offer for twenty-five years imprisonment on Count I and five years imprisonment on Counts II and III, for a total of thirty years imprisonment. 949 S.W.2d at 945. Defendant claimed that he was prejudiced as a result, since unaware of the offer, he elected to go to trial where he was convicted and received life imprisonment on one count and multiple year sentences on other counts to run consecutive with the life sentence. *Id.* at 938, 946. The court found defendant had sufficiently alleged ineffective assistance of counsel based on counsel's failure to communicate an offered plea and remanded the case for an evidentiary hearing. *Id.* at 946.

In *Cottle v. Florida*, 733 So.2d 963 (Fla.1999), the court held that "[t]he caselaw uniformly holds that counsel is deficient when he or she fails to relate a plea offer to a client." *Id.* at 966 (citation omitted). Similarly, in *Turner v. Texas*, 49 S.W.3d 461 (Tex.App.2001), the court held that defense counsel's failure to communicate a deadline attached to a plea offer constituted ineffective assistance of counsel. The court held that it was not reasonable trial strategy for trial counsel to withhold the deadline from the defendant merely because trial counsel believed the defendant would be forced to make a faster decision. *Id.* at 470. The court stated "the only reasonable strategy ... would have been to timely notify Appellant of the imminently approaching deadline." *Id.*

Here, Frye contends the Offer was not communicated to him at all. We can conceive of no reasonable trial strategy that would justify trial counsel's failure to communicate the Offer to Frye. We conclude, consistent with Members, that if Frye was not advised of the Offer, he has established the Strickland performance prong. We turn our attention, therefore, to whether Frye established that he was not told of the Offer.

In its Findings of Fact, Conclusions of Law, and Judgment, the motion court acknowledges Frye's testimony that he was not advised of the Offer until after he was incarcerated. The motion court did not indicate whether it found Frye's testimony to be believable. The motion court acknowledged trial counsel's testimony that he could not recall whether he had informed Frye about the Offer. The trial court found trial counsel's testimony to be credible. The effect was a finding that trial counsel credibly reported no recollection of informing Frye of the

Offer. The motion court did not make an express finding with respect to whether Frye knew of the Offer. However, the motion court found that "even assuming that counsel failed to tell Movant of the offer, counsel cannot be faulted for failing to inform Movant of an offer when Movant fails to stay in touch with counsel."

The motion court was required to "issue findings of fact and conclusions of law on all issues presented." Rule 24.035(j) (emphasis added). While " '[t]here is no precise formula to which findings of fact and conclusions of law must conform,' they must address all of the issues raised and be sufficiently specific to allow for meaningful appellate review." *Grimes v. State*, 260 S.W.3d 374, 375 (Mo.App. W.D.2008) (quoting *Ivory v. State*, 211 S.W.3d 185, 189 (Mo.App. W.D.2007)). We are typically required to remand a case back to the court for requisite findings of fact that have not been made. *Id.* We do not believe the absence of an express finding of fact as to Frye's knowledge of the Offer requires remand, however. The motion court found trial counsel's testimony credible. Trial counsel's testimony included not only his concession of no memory one way or the other of having informed Frye of the Offer but also a general discussion of difficulties trial counsel had communicating with Frye. By finding that "even if" Frye did not know of the Offer it was Frye's fault, the motion court can be reasonably assumed to have made the implicit finding that Frye did not know of the Offer and that he was to blame for his lack of knowledge. We believe, therefore, that the motion court's findings of fact are "sufficiently specific to allow for meaningful appellate review." Id. We agree with the trial court's implicit finding that Frye was not informed of the Offer. We do not agree,

however, that the record supported a finding that Frye was to blame for trial counsel's failure to communicate the Offer.

At the post-conviction hearing, trial counsel testified:

> Counsel, we've talked about this on the phone. I have wracked my brain to try to remember what happened in Mr. Frye's case. I can tell you that I do remember that communication—I'm not suggesting through faults of his own, but he lived in St. Louis, and communication—I believe I had different phone numbers from time to time. **I'm not sure if I communicated this to him or not**, simply because I don't remember him being in court with me as often as most of my other clients; that he was from St. Louis, and that I think that he missed court a few times. And I don't believe I saw him again until after this offer would have been revoked by operation of the language of it, of the letter.

(Emphasis added.) Although trial counsel testified that Frye "missed court a few times," the only missed court appearances reflected in the record were between January 4, 2008, and March 3, 2008, after the Offer expired. During the Offer window, Frye never failed to appear in court because there were no scheduled court appearances during that time. Though trial counsel stated that Frye had different phone numbers from time to time, the only specific evidence relating to how this impacted trial counsel's

communication with Frye was trial counsel's testimony that: "Oh, I called him on the 28th and noted in my file that his phone was not in service," referring to January 28, 2008. Trial counsel also testified that on February 4, 2008, Frye gave him an updated number, suggesting Frye initiated contact with him to provide this information. Trial counsel never testified that he made any unsuccessful effort to contact Frye by phone during the Offer window. Instead, trial counsel conceded: "I'm not sure if I communicated this [the Offer] to him or not."

The record also indicates that there was no communication by mail between trial counsel and Frye during the Offer window. Frye's client file is void of correspondence to Frye communicating the Offer. Trial counsel testified that the absence of a letter in Frye's file reflecting transmittal of the Offer would tend to indicate that no effort was made to communicate the Offer to Frye in writing.

Pursuant to the Rules of Professional Conduct that govern the Missouri Bar, Frye's trial counsel had an absolute duty to keep Frye informed of plea communications. Rule 4-1.4 states: "(a) A lawyer shall: (1) keep the client reasonably informed about the status of the matter; [and] ... (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation." See also *In re Crews*, 159 S.W.3d 355, 359 (Mo. banc 2005). Pursuant to Rule 4-1.4 comments one and two, counsel is required to keep the client informed of significant developments in the case, and "a lawyer who receives from opposing counsel ... a proffered plea bargain in a criminal case ***must promptly inform the client of its substance.***" (Emphasis added).

The motion court correctly noted that "[t]he reasonableness of counsel's actions [to determine if the performance prong was met] may be determined or substantially influenced by the defendant's own statement or actions." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. However, counsel's failure to act is only justifiable in circumstances where, because of the defendant's own conduct, counsel was unable to properly carry out his responsibilities. *State v. Johnson*, 901 S.W.2d 60, 63 (Mo. banc 1995) (finding that trial counsel was not ineffective for failing to call a witness because the defendant failed to inform him of the witness's existence until after trial). It is only when a defendant's behavior leads to a fundamental lack of information on the part of counsel that counsel is excused from the reasonable standard of performance. *Id.*; *see also Cherco v. State*, 309 S.W.3d 819, 825-26 (Mo.App. W.D. 2010) (finding the performance prong of *Strickland* was not met because defendant failed to stay in touch with counsel, despite repeated attempts by counsel to contact him). In this case, trial counsel could not be excused from his absolute duty to communicate the Offer to Frye unless Frye's behavior caused trial counsel to be unable to do so. The record is void of ***any*** evidence of ***any*** effort by trial counsel to communicate the Offer to Frye during the Offer window, let alone any evidence that Frye's conduct interfered with trial counsel's ability to do so.

Reviewing the entire record, therefore, we are left with a definite and firm impression that a mistake has been made. The trial court clearly erred in blaming Frye for "failing to stay in touch" with counsel during the six week Offer window, a finding which effectively shifted to Frye the duty to "stay in

touch," and which divested trial counsel of his absolute duty to communicate the Offer to his client. As there was no evidence that any effort of any kind was made by trial counsel to timely inform Frye of the Offer, we conclude that Frye established by a preponderance of the evidence that he was not informed of the Offer while the Offer was pending or before his guilty plea. As a result, trial counsel's performance was deficient. *Members*, 204 S.W.3d at 213. The *Strickland* performance prong has been met. We now determine whether trial counsel's failure to communicate the Offer prejudiced Frye.

Prejudice Prong

In *Strickland*, the Supreme Court articulated the standard for prejudice, stating that a defendant must show a reasonable probability that, but for counsel's alleged deficiencies, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The *Strickland* prejudice prong has since been interpreted by the Court in *Hill*, in the context of guilty pleas, to mean that in order to show prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59, 106 S.Ct. 366. The State contends that because Frye did not contend that "but for" trial counsel's failure he would have insisted on going to trial, Frye cannot establish prejudice as a matter of law. We disagree.

In *Hill*, the Supreme Court extended the *Strickland* analysis to guilty plea proceedings, noting that "our justifications for imposing the 'prejudice' requirement ... are also relevant in the context of guilty pleas." *Hill*, 474 U.S. at 57, 106 S.Ct. 366

(citing *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052). These justifications were:

> The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. ***Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.***

Id. (citing *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052) (emphasis added). *Hill* thus acknowledges that the *Strickland* inquiry for "prejudice" necessarily depends on the specific evidence and circumstances surrounding the claimed error. *Id.* It follows, therefore, that the determinative factors for evaluating whether counsel's ineffectiveness is prejudicial must be based on the specific facts and circumstances of the case. Reliance on *Hill*'s "template" that a defendant must contend that "but for" counsel's ineffective assistance the defendant would have insisted on going to trial as determinative of whether

a defendant can establish prejudice completely ignores *Strickland*'s looser emphasis on whether a defendant can establish "an adverse effect on the defense." *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052. We conclude that though prejudice may, and often will, be established by a defendant's showing that "but for" counsel's ineffective assistance, the defendant would not have pled guilty and would have insisted on going to trial, this is not the only way prejudice can be established. According to *Strickland*, the test of prejudice is whether "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. *See Colbert*, 949 S.W.2d at 940 ("To demonstrate prejudice, the movant must show a reasonable probability that, but for his attorney's unprofessional errors, ***the result of the proceeding would have been different.***") (citing *State v. Harris*, 870 S.W.2d 798, 814 (Mo. banc 1994), *cert. denied*, 513 U.S. 953, 115 S.Ct. 371, 130 L.Ed.2d 323 (1994)) (emphasis added).

In a case similar to the one before us, our Supreme Court has demonstrated its agreement with this approach to establishing prejudice. In *Dobbins v. State*, 187 S.W.3d 865 (Mo. banc 2006), Dobbins, relying on the advice of counsel, rejected a ten year imprisonment plea with the State, and instead entered an "open" guilty plea. *Id.* at 866. Dobbins was subsequently sentenced to eighteen years for possession of marijuana with the intent to distribute. *Id.* Dobbins filed a Rule 24.035 motion alleging counsel affirmatively mislead him about his eligibility for early release. *Id.* The Supreme Court found that Dobbins received ineffective assistance of counsel based on counsel's affirmative misrepresen-

tation, and in discussing whether prejudice had been established, noted:

> Counsel's ineffectiveness must be joined with prejudice to afford Dobbins relief. In this case, ***Dobbins was prejudiced because he rejected an offer to plead to a charge resulting in a 10-year sentence. If he had known he was not able to challenge the sentence, he would not have entered an open plea, but would have accepted the offer***, which matched the lowest sentence he could have received under the open plea agreement. Moreover, the facts relating to Dobbins' understanding of the pleas and his agreement that no one had promised leniency for the plea are irrelevant. It was not the sentence to be imposed that concerned Dobbins-it was his eligibility for sentence reduction as to any sentence that was imposed. ***His attorney's affirmative misrepresentation as to his ability to challenge the sentence prejudiced Dobbins by causing him to plead guilty when he otherwise would not have done so.***

Id. at 867 (emphasis added). Reading the above passage as a whole, it is apparent the Supreme Court did not employ the narrow *Hill* "but for" test to find prejudice in *Dobbins*. As in *Dobbins*, Frye did not accept a plea offer that he says he would have accepted but for counsel's ineffective assistance. As in *Dobbins*, Frye does not contend in his post-conviction motion that but for counsel's ineffective

assistance, he would not have pled guilty and would have insisted on going to trial.

Here, the motion court denied Frye's post-conviction motion because "[e]ven assuming that counsel can be faulted for failing to tell Movant about this plea offer, Movant would not be entitled to a remand because claims under Rule 24.035 must include a claim that Movant would have gone to trial but for his counsel's errors." The motion court did not discuss *Dobbins*. Instead, the motion court cited *Beach v. State*, 220 S.W.3d 360 (Mo.App. S.D. 2007), which addresses *Dobbins*. The court in *Beach* read *Dobbin*'s statement that defendant was caused "to plead guilty when he otherwise would not have done so" to mean Dobbins would not have plead guilty and would have insisted on going to trial. *Beach*, 220 S.W.3d at 367. The Southern District stated, "this sentence clearly states that, but for ineffectiveness of plea counsel, Dobbins would not have pleaded guilty. By implication, the only alternative to not pleading guilty is to go to trial. Thus, the Court applied the *Hill* standard without citation." *Id.* at 368. We decline to so interpret *Dobbins*. The Southern District's reading of a single sentence in *Dobbins* out of context ignores the balance of the Supreme Court's discussion which included the statement that had the defendant "known he was not able to challenge the sentence, ***he would not have entered an open plea, but would have accepted the offer.***" *Dobbins*, 187 S.W.3d at 867 (emphasis added). *Beach*'s interpretation of *Dobbins* and its application of *Hill* would leave a defendant with no recourse even if the defendant has clearly established that "but for" his counsel's ineffective assistance the outcome of his proceeding would have been different. Our court does not construe *Hill* to bar other means

of establishing prejudice when insisting on going to trial cannot possibly remediate ineffective assistance that has affected the outcome of the proceeding. *Cherco*, 309 S.W.3d at 829-30 (finding ineffective assistance of counsel during the sentencing phase may warrant remand for resentencing without an allegation by the defendant that he would not have pled guilty and would have insisted on going to trial); *see also Members*, 204 S.W.3d at 213 (finding that a defendant has been prejudiced if the defendant proves that counsel failed to communicate a plea offer that the defendant would have accepted).

Other jurisdictions have found prejudice when counsel fails to inform a defendant of a plea offer, notwithstanding defendant's failure to contend he would have insisted on going to trial. In *Turner*, the court found "the record shows that Appellant was prejudiced by defense counsel's ineffectiveness and that, but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different." 49 S.W.3d at 470. The court went on to conclude that when a defendant was not informed of a deadline placed on a plea offer, and when "the record shows that Appellant would have timely accepted the offer had the deadline been properly conveyed to him, Appellant has satisfied the burden of showing prejudice." *Id.* In *Cottle*, defendant claimed he received ineffective assistance of counsel because his counsel failed to convey the State's plea offer. 733 So.2d at 964-65. The court held that "an inherent prejudice results from a defendant's inability, due to counsel's neglect, to make an informed decision whether to plea bargain, which exists independently of the objective viability of the actual offer." *Id.* at 969 (citations omitted).

In light of the foregoing, we find the motion court's conclusion that Frye was not prejudiced by trial counsel's failure to communicate the Offer merely because Frye did not contend that he would have insisted on going to trial to be a clearly erroneous finding of fact based on a clearly erroneous declaration of the law.

The motion court also concluded that remand of Frye's case would not be proper because now that the Offer has expired, the State cannot be compelled to renew the Offer. Moreover, according to the motion court, the State would have the power to withdraw the Offer, even if renewed, at any time before sentencing.

"While a defendant has no constitutional right to a plea bargain, *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977), during negotiations he is entitled to presuppose fairness in the agreement." *State v. Price*, 787 S.W.2d 296, 299 (Mo.App. W.D. 1990) (citing *Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)). This fairness guarantee was restricted in *Mabry v. Johnson*, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984). A "plea agreement standing alone is without constitutional significance." *Id.* at 507. Thus, "[u]nless a plea agreement impaired the voluntariness or intelligence of a guilty plea, the defendant has no constitutional right to have the plea specifically enforced." *Price*, 787 S.W.2d at 299 (citing *Mabry*, 467 U.S. at 510, 104 S.Ct. 2543). The Court in *Mabry*, in discussing a plea offer, "found that the question of whether a prosecutor was negligent or otherwise culpable in first making and then withdrawing an offer was not relevant to a due process argument." *Price*, 787 S.W.2d at 299-300

(citing *Mabry*, 467 U.S. at 511, 104 S.Ct. 2543). Thus, it does in fact appear that a plea offer can be withdrawn at any time before it is accepted by the court, and a plea offer once accepted by the defendant can be withdrawn without recourse,[4] unless, as noted in Mabry, the plea agreement impaired the voluntariness of the guilty plea.

However, we are not dealing with a case of claimed prosecutorial misconduct. *Price*, *Mabry*, and the other cases cited by the motion court in its Judgment relating to the enforceability of a plea offer or agreement all arose in the context of a defendant's claim of prosecutorial misconduct in withdrawing or failing to honor a plea. Here, the claimed constitutional violation relates to Frye's entitlement to effective assistance of counsel. The motion court suggests that unless there is a suitable means of remediating the demonstrated ineffective assistance of counsel, there can be no prejudice. In other words, the motion court suggests that because we cannot compel the State to renew the Offer, Frye is not prejudiced because we cannot, by remanding this case, restore Frye to the position he would have been in but for the ineffective assistance.

We do not believe the determination of prejudice can be bootstrapped in this fashion. The State had exclusive control over the charging of Frye's offense. Thus, had Frye been advised of the Offer, and had he accepted the Offer, the trial court would have been bound to accept the guilty plea for the misdemeanor

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[4] For example, the State may well have withdrawn the Offer, even if accepted by Frye, if it became aware prior to sentencing of Frye's new charge on December 30, 2007.

charge.[5] The maximum jail sentence that the trial judge could have imposed for the misdemeanor plea was one year imprisonment. Section 558.011. The maximum sentence for the class D felony to which Frye entered an "open" guilty plea was four years. *Id.* Frye received three years. Because of trial counsel's failure to inform Frye of the Offer, Frye pled guilty to a felony instead of a misdemeanor and was subject to a maximum sentence of four years instead of one year. We conclude that notwithstanding the practical difficulties associated with Frye's recourse, Frye has nonetheless established prejudice pursuant to *Strickland*. We are left with a definite and firm impression that a mistake was made. We find that Frye did sufficiently prove, by a preponderance of the evidence, that he was prejudiced through trial counsel's failure to convey the State's Offer.[6]

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[5] Of course, the trial court would have been free to sentence Frye along the continuum of the range of punishment applicable to the misdemeanor, just as it was free to sentence Frye along the continuum of the range of punishment for the felony to which Frye entered his "open" plea. Had the Offer only addressed a non-binding sentencing recommendation in exchange for a plea of guilty on the original felony charge of driving while revoked, Frye would be hard pressed to establish prejudice, notwithstanding counsel's failure to communicate the Offer, as the State's Offer would not have been binding, in any manner, on the trial court.

[6] We are aware that Frye's new misdemeanor charge apparently influenced trial counsel's decision not to request an extension of the Offer from the State. That new charge was obtained by Frye after the Offer window expired. Trial counsel's belief about whether he could have persuaded the State to renew the Offer is irrelevant as Frye does not contend ineffective assistance of counsel on this basis. It is sufficient for Frye's showing of prejudice that the Offer window would have permitted Frye to accept the Offer and to have submitted to a guilty plea hearing on the amended charge in advance of receiving yet another charge for driving while revoked.

We are left then with discerning the appropriate recourse for Frye's established Rule 24.035 violation. Rule 24.035(j) provides that if a basis for Rule 24.035 relief is determined to exist, "the court shall vacate and set aside the judgment and shall discharge the movant or resentence the movant or order a new trial or correct the judgment and sentence ***as appropriate.***" (Emphasis added.) Though in this case, the ***"appropriate"*** remediation might be to afford Frye the opportunity to plead guilty to the amended charge of misdemeanor driving while revoked, we appreciate that we are not empowered to order the State to reduce the charge against Frye. A remand, therefore, may leave Frye with but two options—proceed to trial or plead guilty to and be resentenced for the same felony driving while revoked charge to which Frye originally entered his "open" guilty plea. Though this is [sic] may not seem a satisfactory remedy for Frye, our alternative is to ignore the merits of Frye's claim, which we are unwilling to do.

Our Supreme Court faced the same constraint we face today in Dobbins. Upon finding prejudice arising out of a similar scenario where a defendant claimed ineffective assistance of counsel prejudiced him from accepting an earlier plea offer, the Court reversed the judgment and remanded the case. *Dobbins*, 187 S.W.3d at 867. We will do the same, deferring to Frye whether he desires to insist on a trial or to plead guilty to the charged offense or to such other amended charge as the State may deem it appropriate to offer.[7] In either case, we will be

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[7] In *Turner*, the Texas Court of Appeals remediated a similar set of circumstances by reversing the trial court's

affording Frye that to which he is entitled—the effective assistance of counsel. We are cognizant that the State did absolutely nothing wrong in this case and is not responsible for Frye's trial counsel's failure to communicate the Offer.

Conclusion

We reverse the judgment entered on the guilty plea and deem the guilty plea withdrawn. We remand this case for further proceedings.

Cynthia L. Martin, Judge

All Concur.

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judgment and remanded the case "with orders to withdraw the appellant's plea, require the State to reinstate the plea offer as it existed prior to the Sixth Amendment violation, and allow the appellant to replead to the indictment." 49 S.W.3d at 471. We do not share the Texas court's belief that we are empowered to mandate the State to offer pleas or to amend charges, notwithstanding our finding that Frye's Sixth Amendment rights have been violated.

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

GALIN E. FRYE, Movant,	)
vs.	)CASE NO. 08BA-CV03050
STATE OF MISSOURI, Respondent.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Now on this 18th day of November, 2008, the court enters the following findings of fact and conclusions of law as required by Rule 24.035(j):

On March 3, 2008, Movant pled guilty to one count of felony of driving while revoked pursuant to a plea agreement where the State recommended three years in the Department of Corrections and deferred to the court as to probation. On May 5, 2008, Movant was sentenced to three years in the Department of Corrections.

Movant timely filed his *pro se* motion for post-conviction relief and following appointment of counsel, Movant filed his amended motion on September 5, 2008.

On October 3, 2008, an evidentiary hearing was held where Movant and his counsel testified.

Claim 8a) Movant's only claim is that his counsel was ineffective for failing to inform him that the State had made an offer for him to plead to a misdemeanor driving while revoked with a 90 day jail sentence. Movant claims that had he known the

State had made that offer, he would have accepted that plea offer. Movant does not claim that he would have gone to trial but for his counsel's actions.

Movant testified at the evidentiary hearing that he was unaware that the State had made a misdemeanor plea offer. Movant testified that had he known about the plea offer, he would have accepted that offer.

Movant's trial counsel testified that he could not recall whether he had informed Movant about the misdemeanor plea offer but that he did recall that Movant was extremely difficult to get in touch with and that he had changed his telephone number multiple times. Counsel also testified that the misdemeanor offer expired on December 28, 2008 and that counsel was aware that the prosecutor, Brent Nelson did not normally extend his offers past the revocation date. Counsel testified the misdemeanor offer had expired and was revoked before his saw Movant in court. Thus, there was no misdemeanor offer to accept. This Court finds counsel's testimony credible. Even assuming that counsel failed to tell Movant of the offer, counsel cannot be faulted for failing to inform Movant of an offer when Movant fails to stay in touch with counsel.

In any event, Movant's claim cannot succeed. Even assuming that counsel can be faulted for failing to tell Movant about his plea offer, Movant would not be entitled to a remand because claims under Rule 24.035 must include a claim that Movant would have gone to trial but for his counsel's errors. This Court agrees with the Southern District Court of Appeals analysis in Beach v. State, 220 S.W.3d 360 (Mo.App., S.D. 2006):

In the present case, Movant's only allegation of prejudice is that, but for plea counsel's alleged misadvice with regard to his chances for probation, he would not have rejected the fifteen-year plea offer previously extended by the State. Based upon this fact, and applying the above legal principles, we conclude the following. Movant's constitutional right to effective assistance of counsel is premised upon and exists to provide protection of Movant's constitutionally guaranteed fundamental right to a fair trial. However, Movant's plea of guilty waived his right to a trial, so no trial was held. Thus, the only way to properly evaluate the alleged ineffectiveness of Movant's plea counsel is by what effect, if any, counsel's alleged error had upon Movant's waiver of his right to a fair trial, i.e., is his waiver of trial by guilty plea knowing and voluntary. So, if there is a reasonable probability that, but for plea counsel's alleged error, Movant would not have pleaded guilty thereby waiving his right to a trial, but would have insisted upon going to trial, then Movant's constitutionally guaranteed fundamental right to a fair trial has been denied, and Movant is constitutionally prejudiced by the alleged ineffective assistance of his counsel. If, however, despite the alleged error by counsel, Movant asserts, as he has in his Rule 24.035 motion, that he would have persisted in waiving his constitutional right to a fair trial by pleading guilty, then Movant has not been denied his right to a fair trial and is not constitutionally prejudiced by counsel's alleged ineffectiveness. Based upon the allegations contained in Movant's motion, we

conclude that Movant's conviction is not the result of a violation of Movant's constitutional right to effective assistance of counsel and, as such, is not cognizable under Rule 24.035. A contrary conclusion raises two problems. To conclude otherwise challenges the finality in all criminal convictions entered as a result of a guilty plea—a concern directly addressed by the United States Supreme Court in *Hill, supra*. Virtually every criminal case resolved by a guilty plea involves plea negotiations, and, in those few that do not, an argument could be made that plea counsel was ineffective for not engaging in plea negotiations. Therefore, if any perceived prejudice to a movant in such plea negotiations rises to the level of constitutional prejudice to support an ineffective assistance of counsel claim, every guilty plea would require an evidentiary hearing on the ensuring Rule 24.035 motion. The *Hill* court resolved this potential finality question by premising a Movant's constitution prejudice upon whether, but for plea counsel's alleged error, the Movant would have pleaded not guilty and insisted upon a trial. Aside from the finality issue, a contrary conclusion presents a practical problem as well: What is Movant's remedy? If, upon remand and an evidentiary hearing, the movant court finds that the Movant's alleged facts are true, then the motion court would be required to vacate and set aside the judgment and set the case for either resentencing or trial. See Rule 24.035(j). Yet, setting the case for resentencing would not be an effective remedy because the motion court has no power to require the State to reinstate the alleged favorable plea offer.

> The State could simply refuse to offer Movant any plea agreement. In the absence of the alleged favorable plea offer or any other plea offer, setting the case for trial would not be an appropriate remedy because, based upon the record before the motion court, Movant has already made the decision to plead guilty based on the terms of the alleged less-favorable plea agreement rather than insist on a trial.

[citations omitted].

Here, Movant does not claim he would have gone to trial. He only claims that he would have accepted the misdemeanor offer that no longer existed. Movant is not even entitled to a plea agreement or plea offer. State v. Honorable Cynthia Eckelkamp, 133 S.W.3d 72 (Mo.App. E.D. 2004).

Nor is Movant entitled to a remand. Movant would not be able to take advantage of the plea offer as it has been withdrawn by the State, the State would not be required to renew that offer. Even if the State was required to renew the offer, it would have the option of withdrawing it before it was accepted by the trial court. See Griffith v. State, 845 S.W.2d 684, 686-687 (Mo.App. S.D. 1993); Stokes v. State, 688 S.W.2d 19, 22 (Mo.App. E.D. 1985). See Bryan v. State, 134 S.W.3d 795, 804 (Mo.App. S.D. 2004) (for similar facts; "A second difficulty is that Bryan contends he was denied the opportunity to plead guilty on terms he now finds acceptable. Remanding the case would be an ineffective remedy since we have no power to require the State to reinstate any of the various plea offers which Bryan previously turned down. [citations omitted]. Assuming we

reversed the trial court's decision and remanded the case, the State could simply refuse to offer Bryan any plea agreement"); see also Rowland v. State, 129 S.W.3d 507 (Mo.App. S.D. 2004). Because Movant has failed to claim, either at the evidentiary hearing or in his motion, that he would have gone to trial but for his trial counsel's actions and because a remand would be improper, this Court finds that Movant is entitled to no relief.

Movant's claim is denied.

SUMMARY

It is the conclusion of this Court that Movant has failed to show that his conviction or sentence violates the Constitution or laws of this State or of the United States.

WHEREFORE, it is the judgment of this Court that all of the Movant's claims are denied. Costs taxed against Boone County, Missouri.

SO ORDERED, this 18th day of November, 2008.

/s/ Gene Hamilton
Gene Hamilton
Circuit Judge, Division I

[Excerpt from the Legal File, pp. 19-26]

Guilty Plea and Sentencing Hearing
March 3, 2008

* *

THE COURT: Case Number 3869, State vs. Galen Edward Frye.

MR. COLES: Yes, your Honor.

THE COURT: You are Galen Edward Frye?

THE DEFENDANT: Yes, sir.

THE COURT: And you appear here with Mr. Coles. He's an attorney who has been appointed to represent you. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: What's the matter before the Court?

MR. COLES: Your Honor, we wish to withdraw our plea of not guilty and enter a plea of guilty on this matter. We would note for the Court that this will be in the way of an open plea.

THE COURT: Okay. You heard what your attorney said, Mr. Frye. Is that what you want to do?

THE DEFENDANT: Yes, sir.

THE COURT: Please raise your right hand and be sworn.

(THE WITNESS WAS SWORN BY DEPUTY CLERK OF COURT SEVERS.)

* * *

THE COURT: Please take the witness stand.

(The witness complied.)

* * *

GALEN EDWARD FRYE

being first duly sworn, testified as follows:

* * *

EXAMINATION

BY THE COURT:

Q. Mr. Frye, please state your full name.

A. Galin Edward Frye.

Q. Do you understand that by pleading guilty today you're waiving up certain rights that you have?

A. Yes.

Q. Do you understand that among those rights is the right to be tried by a jury?

A. Yes.

Q. Do you understand that if you were tried by a jury, you might be acquitted, found not guilty of this offense?

A. Yes.

Q. But do you understand that there is no acquittal from a plea of guilty?

A. Yes.

Q. Do you understand that if you stood a jury trial, the prosecuting attorney would have to bring her witnesses into the courtroom, they would have to testify, and you and your attorney could be here and cross-examine those witnesses?

A. (Nodding head.)

Q. Do you understand the verdict of the jury would have to be unanimous, all 12 people would have to agree?

A. Yes.

Q. Do you understand the burden of proof would be on the State and that burden of proof would be to prove you guilty beyond a reasonable doubt?

A. Yes.

Q. Do you understand that you'd have the right to present evidence on your own behalf if you wanted to?

A. Yes.

Q. Do you understand that, as the defendant, you'd would have a right to testify if you wanted to, but no one could force you to testify?

A. Yes.

Q. Do you understand that even if you were found guilty by the jury you'd have a right to appeal this Court's decisions?

A. Yes.

Q. Do you understand that if an appellate court found that this trial court had done something wrong, the case might be reversed and you might be released outright?

A. Yes.

Q. Now, knowing those rights to a jury trial, do you desire to waive them today and plead guilty?

A. Yes.

Q. You're charged in the Information with the Class D felony of driving while your license was revoked. Do you understand that the range of punishment for that offense is by a fine, a jail term, a combination of a fine or jail term, or up to four years in the Department of Corrections?

A. Yes.

THE COURT: State intend to make a recommendation, Ms. Wilson?

MS. WILSON: Judge, I understand that this is an open plea.

THE COURT: I'm sorry?

MS. WILSON: This is an open plea.

THE COURT: Okay. So there is no recommendation?

MS. WILSON: There is not.

THE COURT: And that was your understanding, Mr. Coles?

MR. COLES: Yes, your Honor.

BY THE COURT:

Q. Okay. And was that your understanding, Mr. Frye?

A. Yes.

Q. So you understand the full range of punishment still available to me?

A. Yes.

Q. And do you understand that among the things that I could do is to sentence you up to four years and require that you do the time?

A. Yes.

Q. Do you understand that another option would be to sentence you to such a sentence but suspend the execution of it and put you on probation?

A. Yes.

Q. But do you understand another option will be not to impose a sentence but just to put you on probation?

A. Yes.

Q. But do you understand the final decision is up to me?

A. Yes.

Q. And do you understand that if I put you on probation under either set of circumstances, a suspended execution or a suspended imposition, there's a requirement that you do two days in the county jail?

A. Yes.

Q. Has anybody promised you anything that's not been stated here in order to get you to plead guilty against your will?

A. No.

Q. Has anyone threatened you or coerced you in any manner in order to get you to plead guilty against your will?

A. No.

THE COURT: Is there any question of the legality of the arrest or of any search and seizure, Mr. Coles?

MR. COLES: No, your Honor.

BY THE COURT:

Q. Did you make any statements to the police about these matters, Mr. Frye?

A. No, sir.

Q. Looking at the Information, it alleges that this occurred on or about the August the 9th, 2007, here in Boone County, Missouri. And it alleges that at that place you operated a motor vehicle on a highway, on Creasy Springs Road, during a time when your driver's license was revoked under the laws of this state.

Is that true?

A. Yes, sir.

Q. And it alleges you knew that your driver's license was revoked.

Is that true?

A. Yes.

Q. It alleges three prior offenses. It alleges that on the 21st day of May, 2004, you were convicted of diving while revoked in the 13th Judicial Circuit Court of Boone County, Missouri, for events occurring on the 29th of December, 2003.

Is that true?

A. Yes.

Q. Were you represented by an attorney at that time?

A. Yes.

Q. It further alleges that on the 20th day of April, 2006, you were convicted of driving while revoked in the 13th Judicial Circuit Court, Boone County, Missouri, for events occurring on the 15th day of October, 2005.

Is that true?

A. Yes.

Q. And you were represented by counsel At that time?

A. Yes.

Q. It further alleges that on the 10th day of February, 2006, you were convicted of driving while revoked here in Boone County, Missouri, for events occurring on the 10th day of August, 2005.

Is that true?

A. Yes.

Q. Were you represented by an attorney at that time?

A. Yes.

Q. You've been represented in this matter by Mr. Coles. Have you had ample opportunity to meet with him and to discuss the case with him?

A. Yes.

Q. Is there anything you have asked him to do that he has refused to do?

A. No.

Q. Do you have any complaint about the way he's represented you?

A. No.

Q. Have you had any drug or alcohol today causing you to plead guilty against your will?

A. No.

THE COURT: Any other questions now, Mr. Coles?

MR. COLES: No, your Honor.

THE COURT: Has there been discovery?

MR. COLES: There has.

THE COURT: And do you believe that this plea of guilty is in your client's best interest?

MR. COLES: I do, your Honor.

BY THE COURT:

Q. Now, you understand, Mr. Frye, that Mr. Coles can give you advice and make recommendations to you, but it has to be your decision as to whether you plead guilty. Do you understand that?

A. Yes.

Q. And is this your decision to plead guilty?

A. Yes.

OPPOSITION BRIEF

No. 10-444

In the
SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI, Petitioner, v. GALIN EDWARD FRYE, Respondent.

On Petition for Writ of Certiorari
to the Missouri Court of Appeals, Western District

RESPONDENT'S BRIEF IN OPPOSITION TO MISSOURI'S PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Respondent, Galin E. Frye, was the appellant below. Petitioner, the State of Missouri, was the respondent below.

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OPINION BELOW

The Missouri Court of Appeals, Western District, held that Mr. Frye met his post-conviction relief burden to set aside his guilty plea by establishing both the performance and prejudice prongs of ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Frye v. State***, 311 S.W.3d 350, (Mo. App., W.D. 2010). The Court of Appeals found deficient performance in trial counsel's failure to communicate a plea offer to Mr. Frye before its expiration date that was more favorable than the guilty plea Mr. Frye ultimately entered without knowledge of the prior offer. 311 S.W.3d at 353-356. The Court of Appeals also held that Mr. Frye was prejudiced because there is a reasonable probability that but for trial counsel's deficient performance the outcome of Mr. Frye's case would have been different. 311 S.W.3d at 356-359. The Court of Appeals rejected the State's argument that Mr. Frye could not establish prejudice without claiming and proving that but for trial counsel's deficient performance he would have insisted on going to trial. ***Id.*** Finally, the Court of Appeals held that the only remedy it could provide to correct the prejudice was to set aside Mr. Frye's guilty plea and remand the case to the trial court to provide Mr. Frye the opportunity to enter a knowing and voluntary guilty plea, or go to trial. 311 S.W.3d at 359-360. The Court of Appeals believed that it did not have the authority to order the State to renew the previously un-communicated plea offer. 311 S.W.3d at 360-361.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.

Constitution of the United States, Fourteenth Amendment:

[N]or shall any state deprive any person of life, liberty or property without due process of law....

INTRODUCTION AND STATEMENT

The State of Missouri claimed in its Petition for Writ of Certiorari that Mr. Frye "never alleged that his guilty plea (his waiver of this right to trial) was not knowing, intelligent, and voluntary." (State's Petition, p. 9). This is a misstatement of fact which Mr. Frye must correct.

Mr. Frye alleged in his Amended Motion Under Rule 24.035 to set aside his guilty plea that his "guilty plea was entered in an unknowing, involuntary and unintelligent manner because he was denied his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution when his plea attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would have under the same or similar circumstances and as a result thereof, [Mr. Frye] was prejudiced. Specifically,

plea counsel Michael Coles unreasonably failed to inform [Mr. Frye] of the state's plea offer of ninety days incarceration in the Boone County Jail on an amended misdemeanor driving-while-revoked charge. Had counsel informed Movant of the offer, he would have accepted it and pled thereto." (Appendix, A-1 to A-2). The State of Missouri claims in this Petition that Mr. Frye's allegation does not amount to prejudice, but that argument does not eliminate Mr. Frye's allegation of prejudice arising from an unknowing, involuntary and unintelligent plea of guilty that was raised in Mr. Frye's post-conviction motion for relief.

The Missouri Court of Appeals, Western District, recognized Mr. Frye's allegation that his guilty plea was entered unknowingly, involuntarily and unintelligently. It stated in the introduction to its Opinion: "Frye thus contends that his subsequent entry of an 'open' guilty plea to the felony charge of driving while revoked was unknowing, involuntary, and unintelligent. We reverse and remand." (Appendix to Petitioner's petition, pp. A3 to A4).

REASONS FOR DENYING THE WRIT

Plea bargaining is a critical stage of the criminal process. The Sixth Amendment applies to representation during the plea process. Failure to advise a defendant of a plea offer from the government is deficient performance. The fairness of subsequent criminal process through a guilty plea or trial does not vitiate the prejudice resulting from counsel's failure to advise a defendant of a plea offer which deprives the defendant of the opportunity to accept the offer. The cases relied upon by Petitioner do not alter or contradict this conclusion.

The plea bargaining process is a critical stage of a criminal prosecution. ***Iowa v. Tovar***, 541 U.S. 77, 81 (2004); ***Burger v. Kemp***, 483 U.S. 776, 803-804 (1987). Accordingly, the Sixth Amendment applies to representation during the plea process. ***Hill v. Lockhart***, 474 U.S. 52, 57 (1985).

The decision to plead guilty or contest a criminal charge is ordinarily the most important single decision in any criminal case. ***Boria v. Keane***, 99 F.3d 492, 496-497 (2nd Cir. 1996). This decision must ultimately be left to the client's wishes. ***Id***. This Court noted the importance of plea negotiations when it stated in ***Santobello v. New York***, 404 U.S. 257, 261 (1971):

> Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those denied release pending trial; it protects the public from those accused persons who are prone to criminal conduct even while on pretrial release; and by shortening the time between the charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

And the very nature of this process involves a *quid pro quo*: the government avoids the time and expense of a trial and the defendant secures a more advantageous outcome. ***United States ex rel. Caruso v. Zelinski***, 689 F.2d 435, 438 (3rd Cir. 1982).

Failure of counsel to advise a defendant of a plea offer from the government is constitutionally deficient performance. ***Caruso***, 689 F.2d at 438;

United States v. Blaylock, 20 F.3d 1458, 1466 (9th Cir. 1994); *Ex parte Lemke*, 13 S.W.3d 791, 796 (Texas App., 2000); *Turner v. State*, 49 S.W.3d 461, 464-465 (Texas App., 2001). Petitioner does not suggest otherwise. Rather, the Petitioner suggests pursuant to *Hill* that Mr. Frye is entitled to no relief from this ineffective assistance at a critical stage in the criminal proceedings if he does not elect to set aside the more onerous conviction following a subsequent guilty plea and elect to go to trial. Petitioner extends *Hill*, too far.

Hill addressed the test for ineffective assistance of counsel set out in *Strickland v. Washington*, 466 U.S. 668 (1984) in the context of guilty plea accepted by the defendant. The Court in *Hill* held that the test for deficient performance in the plea process remains the same as in a trial context. 474 U.S. at 59. The Court further held that the prejudice element "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id*. In this sense, the Court stated that the defendant must show that but for counsel's ineffectiveness, there is a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial. *Id*.

The ineffectiveness alleged in *Hill* was counsel's incorrect advice regarding parole eligibility. 474 U.S. at 54-55. The Court recognized that many instances of counsel ineffectiveness in the plea process would resemble the inquiry involved in a trial; whether effective representation would lead to

discovery of evidence or legal claims that would have succeeded in a not guilty verdict at trial. ***Id***, 59-60. The Court noted that Hill did not allege that the amount of time he would serve before parole eligibility affected his decision whether to plead guilty or go to trial. ***Id***. at 60. In this sense, counsel's erroneous advice did not affect the outcome of the plea process.

There is a much different prejudice involved when the ineffectiveness of counsel is the failure to even communicate a plea offer. When a plea offer is not communicated the defendant loses the opportunity to present a plea agreement to the court for acceptance in exchange for a lesser sentence. ***Caruso***, 689 F.2d at 438. Had the defendant in ***Blaylock*** accepted the un-communicated plea offer he would have received a much lesser sentence than he received following trial. 20 F.3d at 1467. In ***Ex parte Lemke***, the defendant was prejudiced when he entered a guilty plea to a sixty year sentence without counsel advising him of previous offers of twenty, and then sixteen years in prison. 13 S.W.3d at 798. In ***Turner v. State***, counsel's ineffective representation during the plea process cost the defendant the opportunity to receive a thirty-five year sentence, and he received a life sentence following trial. 49 S.W.3d at 463, 467. Obviously, none of the ineffectiveness in these cases deprived the defendants of a viable defense at trial. But just as obviously the ineffectiveness "affected the outcome of the plea

process," ***Hill***, 474 U.S. at 59, and but for the ineffectiveness "the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694.

The Petitioner argues that Mr. Frye is entitled to no relief because ***Hill*** is intended to protect the right to a fair trial, and a defendant is not entitled to relief from a guilty plea unless he invokes his right to a fair trial. Petitioner relies upon ***Lockhart v. Fretwell***, 506 U.S. 364 (1993) to support this argument, but this reliance is misplaced. ***Fretwell*** ruled that the right to effective assistance is recognized for the effect it has on the ability of the accused to receive a fair trial. 506 U.S. at 369. However, this Court further noted that the Sixth Amendment guarantee is *generally* not implicated absent some effect on the reliability of the trial process. ***Id.*** (emphasis added). This Court further held that an analysis focusing on the outcome of the proceeding is incorrect if attention is not given to whether the result of the proceeding *was fundamentally unfair* or unreliable. ***Id.*** (emphasis added). ***Fretwell*** found neither an effect on the reliability of the trial or fundamental unfairness under the circumstances before the Court. The claim of ineffectiveness in ***Fretwell*** was counsel's failure to make an objection in a sentencing proceeding that would have ultimately been unsuccessful in affecting the sentence. ***Id.*** at 366. This neither affected the trial, nor was fundamentally unfair.

The benchmark of the Sixth Amendment's fundamental right to a fair trial protected in ***Strickland*** is the fairness of the adversary process. ***Fretwell***, 506 U.S. at 368-369, *citing* ***Nix v. Whiteside***, 475 U.S. 157 (1986) and ***United States v. Morrison***, 449 U.S. 361 (1991). The fairness in the adversary criminal process extends beyond just the trial. A critical phase of that process, as noted above, is effective assistance in the process of reaching a plea agreement. The critical nature of the plea process removes the case before the Court in this Petition from the *general* trial process. And prejudice in that critical phase results in fundamental unfairness to the defendant. ***Fretwell*** does not control this issue, and the Petitioner's attempt to invoke it here is misplaced.

The government argued in ***Caruso*** that the defendant was not entitled to relief from ineffective assistance of counsel because Caruso received a fair trial. 689 F.2d at 438. The Court found this argument "untenable." ***Id***. Caruso was prejudiced by the lost opportunity to receive a lesser sentence, and the Court said, "[a] subsequent fair trial does not remedy this deprivation." ***Id***. The ***Blaylock*** Court stated: "[W]e emphasize that although Blaylock has received a fair trial, he is not precluded from showing prejudice. 20 F.3d at 1466. Indeed, the Court noted, "the Sixth Amendment right to effective assistance of counsel guarantees more than the Fifth Amendment right to a fair trial." ***Id***.

This principle has been repeated in cases that did not involve a failure to communicate a plea offer. In ***Williams v. Jones***, 571 F.3d 1086, 1091 (10th Cir. 2009), a case involving a plea rejected on the advice of counsel, the Court stated: "The fact that Mr. Williams subsequently received a fair trial (with a much greater sentence) simply does not vitiate the prejudice from the constitutional violation." In ***United States v. Gonzales-Lopez***, 548 U.S. 140, 146 (2006), this Court was faced with the deprivation of the defendant's counsel of choice, a right guaranteed by the Sixth Amendment. This Court noted: "It is true enough that the purpose of the rights set forth in the Sixth Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." ***Id.*** The Court held, "the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous." ***Id.*** In Mr. Frye's case the right at stake was the right to effective assistance of counsel by communicating a favorable plea offer, not the right to a fair trial, and he was deprived of the constitutional right to counsel.

Petitioner argues that the decision of the Missouri Court of Appeals, Western District, is in conflict with ***United States v. Springs***, 988 F.2d 746 (7th Cir. 1993); ***United States v. Gordon***, 156 F3d 376 (2nd Cir. 1998); ***Hoffman v. Arave***, 455 F.3d 926 (9th Cir. 2006); ***Boria v. Keane***, 99 F.3d 492 (2nd Cir. 1996); ***Beckham v.***

Wainwright, 639 F.2d 262 (5th Cir. 1981); and *State v. Greuber*, 165 P.3d 1185 (Utah 2007). The Petitioner's reference to *Gordon*, *Hoffman*, *Boria*, and *Beckham* seems misplaced because each of those Courts found prejudice and the only issue, as Petitioner noted, involved the appropriate remedy for the prejudice. Petitioner has claimed in this Petition that Mr. Frye cannot show prejudice. It raised no issue regarding remedy. It is difficult to see any conflict between these cases and the opinion of the Missouri Court of Appeals, Western District, challenged by Petitioner here.

Springs is distinguishable on its facts. The defendant in *Springs* claimed ineffective assistance of counsel during plea negotiations because counsel failed to insist that defendant accept a plea offer that counsel believed would result in a sentence below the sentence imposed after trial 988 F.2d at 748. The Court found no prejudice because effective assistance of counsel does not require that counsel be a good negotiator and lock in a deal that beats sentencing guidelines. 988 F.2d at 749. This is a far cry from counsel's failure to advise a defendant of a plea offer at all, an offer that would have resulted in a greatly reduced sentence upon acceptance by the defendant.

The Utah Supreme Court in *Greuber*, held that a fair trial negated a claim of ineffectiveness in plea negotiations, specifically rejecting cases that hold to the contrary. 165 P.3d at 1189. In doing so, however, it noted that the case before it

was "significantly" different from cases holding that a fair trial does *not* negate ineffective assistance of counsel in the failure to communicate a plea offer; citing cases from the Second, Ninth, Eleventh, Seventh, and Third Circuits, and from the states of Florida, Pennsylvania, Texas and Washington. 165 P.2d at 1189, FN4. So too, ***Greuber*** is significantly different from the opinion of the Missouri Court of Appeals, Western District, that Petitioner challenges here because counsel failed to communicate the plea offer.

CONCLUSION

The Missouri Court of Appeals, Western District, faced a situation that was not before this Court in *Hill*. It applied the general principles of *Strickland* recognized in *Hill* to address the specific question before it. It reached the same conclusion as other lower courts addressing the specific issue involved. These cases are not contrary to the specific holding in *Hill*. Petitioner is simply trying to force these circumstances into the ruling in *Hill* to deny Mr. Frye and others like him a remedy for prejudice not addressed by this Court in *Hill*. Its efforts should be rejected and its Petition for a Writ of Certiorari should be denied.

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REPLY BRIEF

ECORD
AND
BRIEFS

NOV 16 2010

No. 10-444

IN THE

Supreme Court of the United States

MISSOURI,
Petitioner,

v.

GALIN E. FRYE,
Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Missouri

REPLY BRIEF

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PETITIONER'S REPLY

Mr. Frye takes issue with the State's assertion that he "never alleged that his guilty plea (his waiver of his right to trial) was not knowing, intelligent, and voluntary." Opp.Br. 2. He points out that his post-conviction motion alleged that his "guilty plea was entered in an unknowing, involuntary and unintelligent manner" because his plea counsel "unreasonably failed to inform [Mr. Frye] of the state's [earlier] plea offer[.]' " Opp.Br. 2-3.

But in making this argument, Mr. Frye either misunderstands the State's assertion or is purposely taking the State's assertion out of context. The petition asserted:

> In Mr. Frye's case, the Missouri court adopted a test for prejudice that does not vindicate any constitutional right. Mr. Frye did not go to trial, and he never alleged that his guilty plea (his waiver of this right to trial) was not knowing, intelligent, and voluntary. Instead, Mr. Frye asserted that he was prejudiced because counsel's failing to communicate a favorable plea offer caused him to miss out on the opportunity of obtaining a lesser sentence.

Pet. 9. This argument was part of the State's claim that Mr. Frye had not alleged prejudice (i.e., an involuntary plea) in the manner required by *Hill v. Lockhart*. *See* Pet. 7-11. And, in that context, the problem with Mr. Frye's claim remains: the bald allegation that Mr. Frye's plea was unknowing, unintelligent, and involuntary was not supported by any allegations or evidence showing that his plea was unknowing, unintelligent, and involuntary.

At the post-conviction evidentiary hearing, with regard to prejudice, the evidence showed only that Mr. Frye missed an earlier opportunity to plead guilty under more favorable terms. But that missed opportunity did not render Mr. Frye's later-in-time guilty plea involuntary, unknowing, or unintelligent. The missed plea offer had expired by the time Mr. Frye pleaded guilty; it no longer existed. And, accordingly, it could not have affected Mr. Frye's decision to plead guilty. *See Mabry v. Johnson*, 467 U.S. 504, 510 (1984) (a withdrawn plea offer "in no sense induced" the defendant's guilty plea). Thus, while it might have been more accurate for the State to assert that Mr. Frye never alleged or proved *facts* showing that his plea was involuntary, unknowing or unintelligent, the relevant point is that Mr. Frye never alleged that his plea was involuntary as required by *Hill v. Lockhart*. And that, of course, is the relevant question: was Mr. Frye required to allege and prove—according to the express terms of *Hill v. Lockhart*—that but for counsel's alleged error, he would not have pleaded guilty and would have insisted on going to trial?

I. A plea offer, standing alone, is not a "critical stage" of a criminal proceeding.

In an attempt to suggest that counsel's failing to convey a plea offer was an error of constitutional magnitude, Mr. Frye asserts, "The plea bargaining process is a critical stage of a criminal prosecution." Opp.Br. 4. In support, Mr. Frye cites *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), and to the dissenting opinion in *Burger v. Kemp*, 483 U.S. 776, 803-804 (1987). Opp.Br. 4.

But neither of these cases supports Mr. Frye's assertion. In *Tovar*, the Court merely stated the

well-settled proposition that "*The entry of a guilty plea*, whether to a misdemeanor or a felony charge, ranks as a 'critical stage' at which the right to counsel adheres." 541 U.S. at 81 (emphasis added). Here, Mr. Frye's claim of ineffective assistance of counsel centers not on the *entry* of his guilty plea, but on counsel's failing to convey a plea offer at a time prior to the entry of his guilty plea. Thus, while *Tovar* certainly confirmed that a defendant has a right to the effective assistance of counsel at a guilty plea hearing, it did not hold that plea negotiations are a "critical stage" of criminal proceedings.

There is some passing language in the dissenting opinion in *Burger v. Kemp* (referring to the defendant's arguments) about the "critical stages" of "pretrial plea negotiations and post-trial appeal," 483 U.S. at 803-804 (Blackmun, J., dissenting), but the Court was not specifically asked to consider (and did not answer the question) whether a defendant who pleads guilty can base a claim of prejudice on an earlier, missed opportunity to plead guilty under more favorable terms. Rather, in *Burger v. Kemp*, the Court considered whether a defendant who had stood trial had received ineffective assistance due to a possible conflict of interest. But conflict-of-interest claims differ from other claims of ineffective assistance of counsel, in that, once an actual conflict of interest is established (and once it can be shown that the conflict "adversely affected" counsel performance), such claims warrant a "presumption of prejudice." *See Strickland v. Washington*, 466 U.S. 668, 692 (1984).

In their brief, the *amici curiae* in support of the petition point out that in *Powell v. Alabama*, 287 U.S. 45, 57 (1932), the Court recognized that, in some cases, "perhaps the most critical period of the

proceedings . . . [is] the time of . . . arraignment until the beginning of . . . trial." This can hardly be gainsaid, for in most cases, counsel's preparation and advice in advance of trial are critical to the fairness of the trial. But even when a claim of ineffective assistance of counsel is based on conduct that occurred pre-trial (e.g., a failure to investigate), under *Strickland*, prejudice is gauged by whether counsel's failing to investigate affected the fairness of the subsequent trial. Thus, even if counsel utterly fails to investigate a witness that, according to all professional norms, should have been investigated during the critical pre-trial period, the jury's verdict will not be undone unless the defendant can show a reasonable probability that the witness's testimony would have affected the outcome of the trial.

The same should be true in the guilty-plea context. Events that occur during the "critical" pre-trial period should only give rise to a claim of ineffective assistance of counsel insofar as they have some bearing on the fairness of the guilty-plea hearing that results in conviction. In other words, in evaluating counsel's pre-plea performance and any resulting prejudice, the inquiry should be limited to determining whether counsel correctly advised the defendant with regard to the guilty plea (and waiver of trial) that was *actually entered*. The inquiry should not be expanded to consider other potential pleas that *might* have been entered if counsel had taken other action—even if other actions might have been professionally required. In short, even if counsel's conduct fell below an objective standard of reasonableness, any claim of prejudice should still be evaluated in light of what the Constitution requires. *See generally United States v. Cronic*, 466 U.S. 648, 665 n. 38 (1984) ("We address not what is prudent or

appropriate, but only what is constitutionally compelled.").

II. Because plea negotiations are not the type of "proceeding" contemplated in *Strickland*, the Missouri court should have adhered to the holding in *Hill v. Lockhart*.

In his brief, Mr. Frye attempts to cast the petitioner's argument as seeking an extension of the holding in *Hill*. Opp.Br. 5. After pointing out that various courts have held that failing to convey a plea offer constitutes deficient performance, he argues:

> the Petitioner suggests pursuant to *Hill* that Mr. Frye is entitled to no relief from this ineffective assistance at a critical stage in the criminal proceedings if he does not elect to set aside the more onerous conviction following a subsequent guilty plea and elect to go to trial. Petitioner extends *Hill*, too far.

Opp.Br. 4-5. But the petitioner is not seeking as extension of *Hill*; the petitioner is seeking adherence to *Hill*.

As discussed in the petition (Pet. 3-4, 9-11), the Missouri court expressly declined to apply *Hill*'s test for prejudice. Instead, the Missouri court opted to rely on what it termed "*Strickland*'s looser emphasis on whether a defendant can establish 'an adverse effect on the defense.' " App. A17. The Missouri court stated, "According to *Strickland*, the test of prejudice is whether 'the result of the proceeding would have been different.' " App. A17.

The practical effect of this holding is to equate plea negotiations with trial proceedings. And by arguing that plea negotiations are a "critical stage"

of criminal proceedings, Mr. Frye is urging the same result. But as the Court recognized in *Hill*, guilty plea proceedings differ fundamentally from trial proceedings. The fairness of trial is not an issue, and, accordingly, in determining whether the defendant was prejudiced, the focus must turn to the fairness of the *waiver* of the right to trial. In other words, petitioner is not "suggest[ing] pursuant to *Hill* that Mr. Frye is entitled to no relief from this ineffective assistance at a critical stage" (Opp.Br. 5); rather, petitioner is pointing out that Mr. Frye has not shown *prejudice* pursuant to *Hill* and, thus, that Mr. Frye has not made the requisite showing of ineffective assistance of counsel.

In sum, Mr. Frye would have the Court accept the Missouri court's conclusion that plea negotiations are a separate "proceeding" (or, as Mr. Frye asserts, a "critical stage" of a criminal proceeding) that is comparable to a trial. But the Court has never held that plea negotiations should be given the same degree of protection that surrounds a trial. To the contrary, the Court has held that "A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest." *Mabry*, 467 U.S. at 507. As the Court stated in *Mabry*, "It is the ensuing guilty plea that implicates the Constitution." *Id.* at 507-508. Accordingly, after a guilty plea, in evaluating whether counsel's error resulted in prejudice, claims should be limited to determining whether counsel's error affected the validity of the waiver of the right to trial (and the guilty plea) that the defendant actually made.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 16, 2010

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-444

Supreme Court, U.S.
FILED
NOV 3 - 2010
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In The

Supreme Court Of The United States

STATE OF MISSOURI,
Petitioner,

v.

GALIN E. FRYE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS,
WESTERN DISTRICT

BRIEF OF AMICI CURIAE CONNECTICUT AND ELEVEN OTHER STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Contrary to the holding in *Hill v. Lockhart*, 474 U.S. 52 (1985) – which held that a defendant must allege that, but for counsel's error, the defendant would have gone to trial – can a defendant who validly pleads guilty successfully assert a claim of ineffective assistance of counsel by alleging instead that, but for counsel's error in failing to communicate a plea offer, he would have pleaded guilty with more favorable terms?

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INTERESTS OF THE AMICI CURIAE

The twelve *amici* states have a compelling interest in defending the presumptively valid judgments of their courts against post-conviction claims of ineffective assistance. They therefore have a strong interest in ensuring that the law governing such claims is properly applied. Thus, the *amici* states have a substantial interest in this Court's determination of whether to review the decision of the Missouri Court of Appeals for the Western District.[1]

STATEMENT OF THE CASE

Galin Frye repeatedly drove while his driving privileges were revoked. He collected three misdemeanor convictions over a two-year period. He faced a fourth conviction when, on August 14, 2007, the State of Missouri charged him with a Class D felony for the same conduct. A4.[2] In Missouri, driving while revoked is a Class D felony on the second or subsequent conviction for driving while intoxicated, or on the fourth

---

[1] In Connecticut, the Chief State's Attorney serves as the equivalent of the Attorney General for criminal matters. CONN. CONST. Amd. XXIII; CONN. GEN. STAT. § 51-278(c). Therefore, Supreme Court Rule 37.4 permits the Chief State's Attorney of Connecticut, as well as the Attorneys General for the other *amici* states, to file supporting briefs on behalf of their respective states without the permission of the parties. Counsel of record for all parties received notice at least ten days prior to the due date of the amicus curiae's intention to file this brief.

[2] "A [number]" refers to the corresponding page of the petitioner's appendix.

conviction for any other offense. MO. REV. STAT. § 302.321.2 (2005).

With respect to the August 2007 charge, the State conveyed to Frye's counsel a plea offer with two alternatives. A4. The State would recommend a three-year term of incarceration, deferred after ten days, in exchange for Frye's guilty plea to the felony charge, or ninety days incarceration in exchange for Frye's guilty plea to a reduced misdemeanor charge. A4. Frye's counsel did not convey the offer to him before it expired. A5. On March 3, 2008, he entered an "open" guilty plea to the class D felony. A6. The State recommended the same three-year deferment. The sentencing court rejected the recommendation, and sentenced Frye to three years incarceration. A6.

Post-conviction, Frye claimed that his guilty plea was involuntary because his lawyer did not convey to him the antecedent offer, which he would have accepted. A7. The trial court rejected Frye's claim, but the Missouri Court of Appeals ("the Missouri court") reversed. The Missouri court held that counsel's failure to convey the plea offer constituted deficient performance. Citing this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), the Missouri court reasoned that "the result of the proceeding" would have been different had counsel conveyed the offer to Frye, because he would have accepted it, and the trial court would have been bound to accept the guilty plea for the misdemeanor charge, for which there was a one-year maximum term of incarceration. Frye, therefore, would have avoided the felony conviction and the three-year term. Hence, the Missouri court held that Frye was

prejudiced, and this prejudice, coupled with the deficient performance in failing to convey the offer, constituted ineffective assistance of counsel in violation of the Sixth Amendment's counsel clause. A8-A23.

The Missouri court recognized that it could not invade the State's control over the charge. Therefore, it remanded the case so that Frye could either insist upon going to trial, or plead guilty to the felony charge or any amended charge the State may have offered. A24.

REASONS FOR GRANTING THE PETITION

Amici respectfully urge this Court to grant the petition because the issues raised are of overriding importance to the states; because the question presented has not been, but should be, settled by this Court; and, because the Missouri court, like many others, has decided the important question raised by the petition in ways that conflict with this Court's relevant decisions.

I. The issues presented by the petition are of overriding importance to the states, because they affect efforts to dispose of criminal cases through plea bargaining

The Missouri court's decision represents a national trend that impairs the states' ability to manage swelling criminal caseloads through plea disposition. This case is emblematic of cases nationwide that have failed to apply, or have misapplied, this Court's precedents. Consequently, there exists a substantial threat to the benefits of plea bargaining recognized by this Court. *Bordenkircher v. Hayes*, 434 U.S. 357, 361-62 (1978); *Santobello v. New York*, 404 U.S. 257, 260-61 (1971); *Brady v. United States*, 397 U.S. 742, 752, 758 (1970). Attorney-Client communications are privileged; the State can only avoid post-conviction litigation regarding an unexecuted plea bargain by declining to extend offers. Alternatively, states face the equal (perhaps greater) impact of exponential litigation emanating from the plea offers they do extend. This Hobson's choice would be easier to digest if it were necessitated by the Constitution and this Court's precedents. Neither requires it.

In *Lafler v. Cooper*, No. 10-209, 79 U.S.L.W. 7 (August 24, 2010), this Court is asked to decide whether a habeas petitioner is entitled to relief where counsel deficiently advised him to reject a plea offer and he was subsequently convicted upon a fair trial. Seventeen states have joined to support the petition, stating that recognition of such a claim "has resulted in a variety of clumsy endeavors to provide a remedy where one is neither deserved nor warranted." Brief of *Amici Curiae*,

Lafler v. Cooper, at 5. This case presents another example, albeit that this criminal case was fairly disposed of by subsequent plea, rather than a trial.

In the Missouri court's view, Frye's constitutional deprivation will be remedied once he is given the option to go to trial or to accept another plea offer, even though either can result in the felony conviction. Yet, the bases for the Missouri court's finding of ineffective assistance – that counsel failed to convey the earlier offer and that Frye received a felony conviction – will still hold true. Thus, even *after* the exercise of the Missouri court's "remedy," the doctrine of *res judicata* could mandate a finding of ineffective assistance. Absent a procedural bar, the State would find itself in an infinite loop of litigation with Frye. Further, the Eighth Circuit has adopted the rule, at issue in *Lafler*, that a subsequent fair trial does not cure the constitutional deprivation. *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995). Thus, on federal habeas review, the Eighth Circuit would be compelled by its earlier decisions to find that the Missouri court's remedy contravened or unreasonably applied federal law. 28 U.S.C. § 2254(d). This predicament results from a failure to recognize that there is no available remedy, because there is no constitutional violation.

In its Sixth Amendment jurisprudence, this Court has measured prejudice from counsel error against the objective standard of that which constitutes a fair trial, which the counsel guarantee exists to secure. *Hill v. Lockhart*, 474 U.S. 52, 59-60 (1985), *citing Strickland v. Washington*, 466 U.S. at 695 ("As we explained in *Strickland* . . . these predictions of the outcome at a

possible trial, where necessary, should be made objectively . . . ."). In *Strickland*, the Court held that a defendant is prejudiced, and counsel therefore *constitutionally* ineffective, when counsel's deficient performance renders the trial unfair. A trial is not unfair unless the defendant is deprived of a substantive or procedural entitlement. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). When the entitlement to a fair trial has been entirely waived through plea disposition, a defendant is prejudiced, and counsel therefore *constitutionally* ineffective, when counsel's deficient performance prompted the waiver. The plea of guilty that waived the entitlement to a trial is deemed involuntary. *Hill*, 474 U.S. at 56.

Cases like the one at bar, which measure prejudice by comparing the terms of disposition – whether by trial or subsequent plea – to the ***subjective*** terms of an earlier plea offer, divest the analysis of objectivity. The analysis focuses not on whether there has been a departure from guaranteed rights as viewed from the Constitution's perspective, but on whether, from the ***defendant's*** perspective, there has been a departure from a more favorable result.

To this end, courts around the country have developed tests, not recognized by this Court, to assuage a defendant's disappointment. In the Second Circuit, for example, a defendant can show ineffective assistance if, but for attorney error, he would have accepted an offer. *Purdy v. United States*, 208 F.3d 41, 49 (2nd Cir. 2000). The same is true in many states. *E.g., People v. DeBella*, 219 P.3d 390, 400 (Colo. App. 2009), *rev'd on other grounds*, 233 P.3d 664 (Colo. 2010); *Cottle v.*

State, 733 So.2d 963, 967 (Fla. 1999); *Elmore v. State*, 285 Ark. 42, 44 (1985); *State v. Winters*, 317 Wis.2d 401, 421 (2009) (claim that counsel failed to *timely* convey offer).

Other designs exist to ensure that a defendant receive – not what the Constitution entitles him to receive – what he would have preferred. For example, in New York, a defendant can prove ineffective assistance if he shows that a plea offer was made, that counsel failed to inform him of the offer, and that he *would have been willing* to accept it. *People v. Fernandez*, 5 N.Y.3d 813, 814 (2005). Florida requires additionally that the defendant show he would have received a "lesser sentence." *Cottle, supra.*

Further, while most jurisdictions recognize a claim of ineffective assistance in the foregone plea context, there is conflict with respect to the principles that govern adjudication. For example, in Connecticut, a habeas petitioner can establish ineffective assistance if his attorney conveys a plea offer to him, but does not do so "meaningfully." *Sanders v. Commissioner of Correction*, 83 Conn. App. 543 (2004). In contrast, the Colorado court in *DeBella* agreed that:

> Such a rule would open the floodgates to ineffective assistance claims based on a convicted defendant's shallow understanding of the proceedings against him.

DeBella, 219 P.3d at 401.

Some courts require proof that a defendant would have accepted a plea offer, but assume, without a showing, the equally speculative conclusion that the trial court would have accepted and imposed its terms, because, *inter alia*, the inquiry would be "extremely difficult to resolve." *Cottle*, 733 So.2d at 968 (and collecting cases, citations omitted), *quoting Turner v. Tennessee*, 858 F.2d 1201, 1207 (6th Cir. 1988) ("we think it unfair and unwise to require litigants to speculate as to how a particular judge would have acted under particular circumstances").[5] In California, though, it must be established that the court would have approved the plea. *In re Alvarez*, 2 Cal.4th 924 (1992). Moreover, courts disagree on how a defendant can prove he would have accepted an offer. In New York, "[a] defendant's self-serving statement, without more, is insufficient." *Fernandez*, 5 N.Y.3d at 814. In South Carolina, "a defendant's self-serving statement may be sufficient to establish actual prejudice". *Davie v. South Carolina*, 381 S.C. 601, 613 (2009).

As a result of these structures, the system has become mired in litigation addressing whether the State extended an offer; whether counsel conveyed it timely, meaningfully, or at all; whether the defendant would have accepted it; and, whether the court would have imposed its terms. The offers of proof often focus on the "he-said, she-said" dispute over whether and how counsel conveyed the State's offer to the defendant.

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[5] In a different context, in *Corbitt v. New Jersey*, 439 U.S. 212, 221 (1978), this Court stated that plea terms more favorable to the defendant do not invalidate sentence imposed after trial where there is no assurance the court would have accepted the plea; *see infra*, n.5.

Frequently, experts are employed to guide a court in its determination of whether counsel dutifully conveyed the offer. *E.g., DeBella*, 219 P.3d at 400-01 (separate experts testifying that short phone call inadequate to convey offer, and that lengthy psychological examination necessary for counsel to be sure client understood offer).

Courts have developed the law haphazardly. The states and the federal government frequently endure layered litigation to resolve factual disputes regarding a plea offer that was intended to avoid a single trial. *E.g., United States v. Herrera*, 412 F.3d 577, 582 (5th Cir. 2005) (remanding for evidentiary hearing on communications between attorney and client); *Griffin v. United States*, 330 F.3d 733, 739 (6th Cir. 2003) (remanding for evidentiary hearing on whether there is a "reasonable probability" defendant would have accepted offer). All of this notwithstanding that there is no *entitlement* to a plea offer. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). Rulings like the Missouri court's lose sight of the common factor in this Court's Sixth Amendment jurisprudence: constitutional deprivation is not measured by what would have happened, but by what a defendant was *entitled* to have happen. This blindness strains governmental resources and the criminal justice system.

The "[d]isposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons." *Santobello*, 404 U.S. at 261. However, an approach that ignores the Constitution's objectivity, and instead finds constitutional prejudice by measuring the disposition

against the subjective terms of an earlier offer, corrodes the benefit of plea bargaining. Among other things, this approach impedes the objective of finality in criminal convictions; instead, it launches the type of litigation that underlies the petition that is now before this Court.

The subjective approach also sacrifices prosecutorial and judicial discretion. "The State to some degree encourages pleas at every important step in the criminal process." *Brady*, 397 U.S. at 750. Prosecutors may withdraw an offer at any time until its terms are "embodied in the judgment of the court." *Mabry v. Johnson*, 467 U.S. 504, 507-08 (1984), *dictum on another point of law disavowed, Puckett v. United States*, 129 S.Ct. 1423, 1430 n.1 (2009). Judges typically have discretion to accept or reject an offer. The subjective approach, which finds prejudice by comparing the judgment to an antecedent plea offer, robs judges and prosecutors of discretion. It permits the *attorney's error*, rather than the Constitution, to fix a defendant's rights, and it fixes those rights by the terms offered to him at the time of the error. Prosecutors and judges must, therefore, ignore later developments, such as continuing criminal conduct by the defendant or the uncovering of additional facts through pre-sentence investigation, in order to effectively remedy the loss of those "rights." *E.g., Ebron v. Commissioner of Correction*, 120 Conn. App. 560, 589, *cert. granted*, 297 Conn. 912 (2010) ("damning" criminal history must be ignored because entry of earlier plea would have ensured its secrecy); *but see Alabama v. Smith*, 490 U.S. 794, 801 (1989) (no violation where sentence imposed after trial greater than that imposed pursuant to vacated plea, because more information available after

trial). Indeed, where a foregone plea offer is followed by a fair trial, the attorney's error has fixed the defendant's "rights" by the plea offer terms, and the jury's deliberation and verdict are nullified.

This Court has clearly stated that the merely executory plea bargain does *not* fix the defendant's rights. *Mabry v. Johnson*, 467 U.S. at 507-08. The creation of a constitutional right from the State's conveyance of a plea offer drains state resources and impedes plea disposition in criminal cases. The resolution of this matter is thus important to the states.

II. The questions raised by the petition have been decided in ways that conflict with this Court's relevant decisions

This Court has repeatedly stated that a defendant's Sixth Amendment rights are fixed by the objective fair trial standard. Where, as here, the contest is between a foregone plea bargain and the dispositive plea, objectivity requires that prejudice be measured not by comparing those events to each other, but by comparing each event to the fair trial standard. The Missouri court's employment of a single inquiry, to determine which plea arrangement was more favorable to Frye, was inappropriate. This Court's precedents, recognizing that the purpose of the Sixth Amendment is to ensure a fair trial, *Strickland*, 466 U.S. at 689, require two separate inquiries in cases like this: 1) Whether counsel's failure to convey the earlier plea offer threatened the delivery of a fair trial; and, 2) Whether the later plea, which waived the trial, was voluntary.

A. Failure to convey a plea offer timely, "meaningfully," or at all, is not an error of constitutional magnitude

The *Strickland* formula determines whether counsel's assistance, when required by the Constitution, has been denied through attorney ineffectiveness. However, *Strickland* does not establish whether counsel's assistance is guaranteed in the first instance. It is *Powell v. Alabama*, 287 U.S. 45 (1932), and its progeny that inform whether counsel's assistance is guaranteed at particular times or events.

Powell guarantees counsel's assistance at trial. But *Powell* also recognizes a pre-trial period, from arraignment to trial, that is "perhaps the most critical period of the proceedings . . . during which the accused requires the guiding hand of counsel." *United States v. Wade*, 388 U.S. 218 (1967), *citing Powell*, 287 U.S. at 57. *Powell's* "critical period" began a recognition that counsel's assistance may be necessary prior to trial, to secure the right to a fair trial. However, some courts have erroneously read *Powell* to hold that counsel's assistance is guaranteed at any event occurring during this "critical period." *See, e.g., Nunes v. Mueller*, 350 F.3d 1045, 1052-53 (9th Cir. 2003).

Powell's "critical period," at which counsel's assistance is *perhaps required*, does not define those times or events at which counsel's assistance is *guaranteed* by the Constitution. Indeed, this Court has recognized a right to counsel even *before* arraignment (i.e., *before* commencement of *Powell's*

"critical period") if counsel's absence may have affected the defense *at trial*. *Escobedo v. Illinois*, 378 U.S. 478, 486 (1964). "The principle of *Powell v. Alabama* and succeeding cases," this Court has explained, "is that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial . . . ." *Wade*, 388 U.S. at 227.

Thus, this Court "has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself" – dangers that threaten the delivery of a fair trial. *United States v. Ash*, 413 U.S. 300, 310-11 (1973). Counsel's assistance is guaranteed at those events, which this Court has labeled "critical *stages*," that may derogate from the right to a fair trial, regardless of *when* those events occur. *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975) (emphasis added) (This Court "has identified as 'critical stages' those pretrial procedures that would *impair defense on the merits* if the accused is required to proceed without counsel"); *Wade*, 388 U.S. at 227-28 (emphasis added) (certain pretrial events "are not critical stages *since there is minimal risk that . . . counsel's absence . . . might derogate from [the] right to a fair trial*"). Moreover, "the opportunity to cure defects at trial causes the confrontation to cease to be critical." *Ash*, 413 U.S. at 316. Therefore, unless the plea negotiation results in the *acceptance* of a plea offer and accompanying waiver of rights, subsequent fair disposition – whether by another plea arrangement or by trial – causes the earlier plea negotiation to "cease to be critical." Counsel's failure to convey the plea offer, though

professionally repugnant, does not implicate the Constitution at all

The *Wade-Ash* line of cases defines the stages at which counsel's assistance is guaranteed. The *Strickland-Hill* line of cases informs whether counsel's assistance was, in fact, effectively delivered at those stages. A constitutional quagmire would result if *Strickland-Hill* finds counsel ineffective with respect to an event at which *Wade-Ash* holds counsel is not guaranteed at all. Therefore, it is by necessity that *Strickland-Hill* shares the *Wade-Ash* focus on the fair trial right. Thus, even if the *Strickland-Hill* test for ineffectiveness were applied, it would not be met by the failure to convey the plea offer.

Strickland-Hill does not focus solely on whether counsel's conduct constituted professional negligence. To be sure, courts have found counsel's failure to convey a plea offer offensive to the ethics of the legal profession. *E.g., Lawyer Disciplinary Board v. Turgeon*, 210 W.Va. 181 (2000); *In re Longacre*, 155 Wash.2d 723 (2005). Some jurisdictions recognize a tort sounding in malpractice for failure to convey a plea offer. *E.g., Krahn v. Kinney*, 43 Ohio St.3d 103 (1989); *Falkner v. Foshaug*, 108 Wash. App. 113 (2001). At times, the cause of action is recognized without regard to whether a conviction has been overturned because counsel was *constitutionally* ineffective. *Krahn, supra*. Other courts, recognizing that such a cause of action might result in "a flood of nuisance litigation" from "criminals who 'may be guilty, [but] . . . could have gotten a better deal,'" require a showing of actual innocence. *Foshaug, supra*, at 123-24.

The question raised by this and similar cases, though, is whether failure to convey the offer rises to a *constitutional* violation. A "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." *Nix v. Whiteside*, 475 U.S. 157, 165 (1986).

> [T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Strickland, 466 U.S. at 689. Thus, a constitutional deprivation is not presumed merely from counsel's professional error.

There are indeed certain Sixth Amendment contexts where prejudice *is* presumed. *Id.* at 692. Those contexts are narrowly circumscribed. *Mickens v. Taylor*, 535 U.S. 162, 166 (2002). In claims of ineffective assistance of counsel, a defendant *must* affirmatively prove that he has been prejudiced. *Strickland*, 466 U.S. at 693. The Missouri court and courts with similar holdings have abandoned this requirement. This abandonment has turned these cases into constitutional referenda on attorney professionalism, and it has erroneously set them among those cases where prejudice is presumed.

Some courts admit to the adoption of a presumed prejudice rule. In *United States v. Rodriguez*, 929 F.2d 747 (1st Cir. 1991), the First Circuit stated that "a failure by defense counsel to inform a defendant of a plea offer can constitute ineffective assistance on grounds of incompetence alone." *Id.* at 753. The Florida Supreme Court also agrees that "an inherent prejudice" emanates from the foregone plea.[4] *Cottle*, 733 So.2d at 969; *see also, State v. James*, 48 Wash.App. 353, (1987) (if counsel failed to convey offer, "we would have no hesitation in concluding that [defendant was] denied effective assistance of counsel on this error alone.").

Other courts abandon the prejudice requirement through an unwitting inversion of the *Strickland-Hill* formula – instead of finding ineffective assistance resulting from prejudice, they find prejudice from a premature conclusion that there has been ineffective assistance. *E.g., Nunes*, 350 F.3d at 1052 (defendant lost right to effective assistance in conveyance of plea, *therefore* he was prejudiced); *Ebron v. Commissioner of Correction, supra*, 120 Conn. App. at 582 (same).

The case at bar is an example of the latter approach. In its prejudice analysis, the Missouri court recognized that there is no entitlement to a plea offer. The Missouri court reasoned, though, that the entitlement Frye lost was an entitlement to the effective assistance of counsel. A22. Thus, Frye was prejudiced *because* he lost the entitlement to effective assistance.

[4] In *Florida v. Nixon*, 543 U.S. 175, 179, 189 (2004), this Court found error in the Florida Supreme Court's presumption of prejudice.

Under *Strickland*, a defendant receives ineffective assistance *because* he was prejudiced.

The trend toward finding prejudice from a lost plea appears to have started long before *Strickland* and *Hill*. In *People v. Whitfield*, 40 Ill.2d 308, 311 (1968), the Illinois Supreme Court stated that "it follows logically that if a defendant has a right to make a decision to plead not guilty, he also has the right to make the decision to plead guilty." *See also, Beckam v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981). Most, if not all, of the United States Courts of Appeals recognize a claim of ineffective assistance of counsel for a lost plea bargain, but many have not undertaken an independent analysis of the constitutional implications. Instead, they have relied on other jurisdictions' analyses, and much can be traced to the Third Circuit's pre-*Strickland*-*Hill* decision in *Caruso v. Zelinsky*, 689 F.2d 435 (1982). *E.g., United States v. Day*, 969 F.2d 39, 44 (3rd Cir. 1992)(Third Circuit citing its decision in *Caruso*); *Turner v. Tennessee*, 858 F.2d 1201, 1207 (6th Cir. 1988) (citing *Caruso*); *United States v. Blaylock*, 20 F.3d 1458, 1466 (9th Cir. 1994) (citing *Day*, which cited *Caruso*); *Teague v. Scott*, 60 F.3d 1167, 1170 & n.13 (5th Cir. 1995) (citing *Caruso* and *Blaylock*, which cited *Day*); *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995) (citing *Caruso*, *Blaylock*, and *Turner*, which cited *Caruso*).[5]

[5] This Court vacated the Sixth Circuit's *Turner* decision in light of its ruling in *Smith*, *supra*, 490 U.S. 794. On remand, the Sixth Circuit persisted that *Turner* was "unaffected" by *Smith*, and affirmed the original opinion. The State petitioned this Court a second time, challenging the lower court's authority to order a remedy, but not raising the issues presented in the instant petition.

(continued...)

Caruso, having been decided before *Strickland-Hill*, does not contemplate *Strickland's* prejudice requirement, as amplified by *Fretwell*. *Caruso* drew its conclusion, that a subsequent fair trial does not cure a foregone plea, from this court's holding in *Rose v. Mitchell*, 443 U.S. 545 (1978). *Caruso, supra*, at 438. In *Rose*, this court held that racial discrimination in jury selection was so systemically cancerous that *prejudice need not be shown*. *Rose, supra*, at 557.

Hence, *Caruso's* legacy is a house built upon a foundation in which the cornerstones of *Strickland* and *Hill* – and their prejudice requirement – are notably missing. For example, the *Day* court stated that "[t]he Sixth Amendment right to effective assistance of counsel guarantees *more than* the Fifth Amendment right to a fair trial." *Day*, 969 F.2d at 45 (emphasis added). In fact, "the Sixth Amendment right to counsel exists . . . in order to protect the fundamental right to a fair trial." *Strickland*, 466 U.S. at 684.

Notwithstanding *Hill*, many courts maintain *Whitfield's* bilateral view in foregone plea cases. *E.g.*, *Williams v. Jones*, 583 F.3d 1254, 1255 (10th Cir. 2009) ("This case merely presents the converse of *Hill*"); *Coulter v. Herring*, 60 F.3d 1499, 1504 n. 7 (11th Cir. 1995) ("we believe that *Hill* also applies when a defendant decided to accept a plea offer.");

[5](...continued)
Tennessee v. Turner, No. 91-776, 60 U.S.L.W. 3439 (December 17, 1991). The petition was denied *Tennessee v. Turner*, 492 U.S. 902 (1992). Subsequently, this Court granted certiorari on the question of remedy. *Arave v. Hoffman*, 552 U.S. 1008 (2007), but the question became moot. *Arave v. Hoffman*, 552 U.S. 117 (2008).

Commonwealth v. Mahar, 442 Mass 11, 14 (2004) (citing *Hill* and stating that the right to counsel "plainly includes counsel's effective assistance in connection with the defendant's decision whether to accept or reject a plea bargain offer"); *Cottle*, 733 So.2d at 967; *People v. Curry*, 178 Ill.2d 509 (1997), *citing Whitfield*, *supra*. *Hill* does not require such symmetry. The *Hill* rule is one-sided because its focus is on the fair trial right – a right which plea *forfeiture* does not threaten. *Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000) ("the decision whether to plead guilty (*i.e.*, waive trial) rest[s] with the defendant . . . [thus] counsel's advice in *Hill* might have caused [him] to forfeit a judicial proceeding to which he was otherwise entitled.").

Caruso's legacy, which sacrifices *Strickland-Hill's* prejudice requirement, also sacrifices *Fretwell's* amplification that *Strickland-Hill* prejudice must be based on the loss of a substantive or procedural entitlement. *Strickland* itself set forth a non-exhaustive list of things to which a defendant has no entitlement and which, therefore, "should not be considered in the prejudice determination." *Strickland*, 466 U.S. at 695. *Fretwell* expounded that *Strickland* prejudice is shown when a defendant is deprived of a "substantive or procedural right to which the law entitles him." *Fretwell*, 506 U.S. at 372.

Thus, when this Court held, in *Nix*, *supra*, 475 U.S. 157 (1986), that the loss of an opportunity to testify falsely was not prejudicial because there is no right to do so, it was not merely because false testimony is lawless. Rather, it was because false testimony is within a broader category of things to which there is no

entitlement. *Fretwell*, 506 U.S. at 370 n. 3. Likewise, in *Fretwell*, counsel's failure to object based upon an incorrect interpretation of the law was not prejudicial, even though the objection *would have* been sustained. There is no *entitlement* to an incorrect interpretation of the law. In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court overruled a determination that *Strickland* prejudice was absent where there *was* a loss of an entitlement. Some have misinterpreted this Court's reversal in *Williams* to be not a reversal of the lower court *pursuant to Fretwell*, but a reversal of *Fretwell* itself. *E.g., Ebron*, 120 Conn. App. at 581 ("we note that the United States Supreme Court has revisited the *Fretwell* decision in *Williams v. Taylor*").

The failure to reverse the pre-*Strickland*-*Hill* trend has led to a struggle to turn the lost plea into a lost entitlement. Some courts have found an entitlement to the offer once it has been extended by the State. *E.g., Nunes*, 350 F.3d at 1052 (recognizing "right to counsel's assistance in making an informed decision once a plea had been put on the table."); *Ebron*, 120 Conn. App. at 582 (issue is not whether defendant was deprived of plea offer, but whether he was deprived of effective assistance "with respect to a plea offer freely made by the state."). This Court has rejected the notion that entitlement springs from a State's discretionary act in extending an offer. *Mabry*, 467 U.S. at 508 & n.5; *see also Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981).

Some courts have found an entitlement to a "lesser sentence" which has been lost by the forfeiture of the plea bargain. *E.g., Ebron*, 120 Conn. App. at 582;

Engelen, 68 F.3d at 241). This Court has held that a lesser sentence does not constitute prejudice, unless it is legally incorrect. *Glover v. United States*, 531 U.S. 198, 204 (2001); *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

Here, the Missouri court recognized that a "lesser sentence," standing alone, is not an appropriate gauge of prejudice. A22-A23 & n.5. It found Frye was prejudiced, though, because he lost the opportunity to plead to the reduced misdemeanor charge, which carried a lesser maximum sentence. *Id.* The question, then, is whether Frye was *entitled* to the misdemeanor notwithstanding that his conduct warranted the felony. This Court has answered that question in the negative. In *United States v. Goodwin*, 457 U.S. 368 (1982), the Court, citing its "acceptance of plea negotiation as a legitimate process," held that due process is not offended by increased charges following a foregone plea deal, where the criminal conduct meets the definition of the crime charged (absent an improper motive such as prosecutorial vindictiveness or racial bias). *Id.* at 378-382 & nn. 10, 11; *see also, Bordenkircher*, 434 U.S. at 364 (In case where enhanced charges followed breakdown in plea negotiations, stating that if conduct is "properly chargeable" under a constitutionally valid statute, "some selectivity in enforcement is not in itself a federal constitutional violation").

In sum, courts have resisted reversing the *pre-Strickland-Hill* trend of finding a constitutional violation in the foregone plea context. In cases like Frye's, which are disposed by plea, this resistance has led to the conclusion that the foregone plea invalidates

JOINT APPENDIX

No. 10-444

IN THE

Supreme Court of the United States

MISSOURI,
Petitioner,

v.

GALIN E. FRYE,
Respondent.

ON WRIT OF CERTIORARI TO THE
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

JOINT APPENDIX

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14-Aug-2007 **Complaint Filed**
Initial Arraignment Scheduled
Scheduled For: 21-Aug-2007; 1:30 PM; LARRY A BRYSON; **Setting:** 0; Boone

21-Aug-2007 **Initial Arraignment Hrng Held**
STATE BY DALLER. DEFT APPEARS PERSONALLY. FORMALLY ARRAIGNED AND ADVISED OF RIGHTS. COUNSEL STATUS HEARING SET 9-7-07; 1:30 PM. DIV 9. P.H. SET 9-21-07; 2:30 P.M. DIV 9. LB/DIV 5 (MLM)
Counsel Status Hrng Scheduled
Scheduled For: 07-Sep-2007; 1:30 PM; CHRISTINE CARPENTER; **Setting:** 0; Boone
Preliminary Hearing Scheduled
Scheduled For: 21-Sept-2007; 2:30 PM; CHRISTINE CARPENTER; **Setting:** 0; Boone

07-Sep-2007 **Hearing Continued/Rescheduled**
STATE BY GRAY. DEFT REQUEST COURT TO RESET. CONTINUE TO PRELIMINARY HEARING SET 9-21-2007, 2:30 P.M., DIV 9. CC/DIV 9 (JP)
Hearing Continued From: 07-Sep-2007; 1:30 PM

21-Sep-2007 **Hearing Continued/Rescheduled**
STATE BY BURGESS. DEFT IN PERSON AND BY PD, WHO ENTERS APPEARANCE. CONTINUED TO NOVEMBER 9, 2007, 2:30 PM, DIVISION 9 FOR PRELIMINARY HEARING. CC/IX (MC)
Hearing Continued From: 21-Sep-2007; 2:30 PM

Preliminary Hearing Scheduled
Scheduled For: 09-Nov-2007; 2:30 PM; CHRISTINE CARPENTER; **Setting:** 0; Boone

25-Sep-2007 **Entry of Appearance Filed**
Filed By: BOONE COUNTY PUBLIC DEFENDER

28-Sep-2007 **Motion for Disclosure**
Filed By: STEPHANIE M MORRELL

29-Oct-2007 **Entry of Appearance Filed**
Filed By: BRENT M NELSON

09-Nov-2007 **Hearing Continued/Rescheduled**
STATE BY GRAY. DEFT BY COLES. DEFT'S MOTION FOR CONTINUANCE SUSTAINED. PRELIMINARY HEARING CONTINUED AND RESET JANUARY 4, 2008, 2:30 PM, DIVISION 9. CC/IX (MC)
Hearing Continued From: 09-Nov-2007; 2:30 PM
Preliminary Hearing Scheduled
Scheduled For: 04-Jan-2008; 2:30 PM; CHRISTINE CARPENTER; **Setting:** 0; Boone

04-Jan-2008 **Judge Assigned**
Bndover Circ-Waive Prel Hrng
STATE BY GRAY. DEFT IN PERSON AND BY PD. DEFT WAIVES PRELIMINARY HEARING AND IS BOUND OVER TO CIRCUIT COURT FOR ARRAIGNMENT JANUARY 14, 2008, 10:30 AM, DIVISION I. CC/IX (MC)
Scheduled For: 04-Jan-2008; 2:30 PM; CHRISTINE CARPENTER; **Setting:** 0; Boone

[Entries from case no. 07BA-CR03869-1]

04-Jan-2008 **Arraignment Scheduled**
Scheduled For: 14-Jan-2008; 10:30 AM; GENE HAMILTON; **Setting:** 0; Boone
Criminal Setting Scheduled

07-Jan-2008 **Judge Assigned**
Information Filed
Filed By: BRENT M NELSON

14-Jan-2008 **Hearing Continued/Rescheduled**
STATE APPEARS BY ASSISTANT PA WILSON. DEFT APPEARS BY COUNSEL KEVIN O'BRIEN. DEFT DOES NOT APPEAR IN PERSON. CAPIAS WARRANT ISSUED. BOND FIXED AT $4500.00. GH/DIV I (CMM)
Hearing Continued From: 14-Jan-2008; 10:30 AM
Warrant Issd Failure to Appear
Document ID: 08-FAWR-199, for FRYE, GALIN EDWARD;
Service/Attempt Date: 22-Jan-2008
Bond Amount: 4,500.00; **Bond Text:** STATE APPEARS BY ASSISTANT PA WILSON. DEFT APPEARS BY COUNSEL KEVIN O'BRIEN. DEFT DOES NOT APPEAR IN PERSON. CAPIAS WARRANT ISSUED. BOND FIXED AT $4500.00. GH/DIV I (CMM)

14-Jan-2008 **Bond Set**
BOND FIXED AT $4500.00. GH/DIV I (CMM)
Hearing Scheduled
Scheduled For: 03-Mar-2008; 10:30 AM; GENE HAMILTON; **Setting:** 0; Boone
DEFT. MUST APPEAR
Jury Trial Scheduled

Scheduled For: 11-Mar-2008; 9:00 AM; GENE HAMILTON; **Setting:** 5; Boone

18-Jan-2008 **Warrant Recalled/Withdrawn**

Document ID – 08-FAWR-199; Served To – FRYE, GALIN EDWARD; Server – BOONE COUNTY SHERIFF'S DEPARTMENT; Served Date – 22-Jan-08; Served Time – 00:00:00; Service Type – Sheriff Department; Reason Description – Recalled/Withdrawn

Arraignment Scheduled

MOTION TO RECALL WARRANT IS SUSTAINED. ARRAIGNMENT IS RESET FOR 01/28/08 AT 1:30 P.M. IN DIV I. JA/DIV IV IN ABSENCE OF DIV I (DB)

Scheduled For: 28-Jan-2008; 1:30 PM; GENE HAMILTON; **Setting:** 0; Boone

28-Jan-2008 **Motion Filed**

STATE'S MOTION TO COMPEL DEFENDANT TO SUBMIT TO FINGERPRINTING PURSUANT TO SECTION 43.503.6 RSMO FILED. (MC)

Filed By: BRENT M NELSON

Hearing Continued/Rescheduled

STATE APPEARS BY ASSISTANT PA HICKS. DEFT APPEARS BY COUNSEL STEVE RICHEY. DEFT DOES NOT APPEAR IN PERSON. CAPIAS WARRANT ISSUED. BOND FIXED AT $4500.00. GH DIV I (CMM)

Hearing Continued From: 28-Jan-2008; 1:30 PM

Warrant Issd Failure to Appear

Document ID: 08-FAWR-474, for FRYE, GALIN EDWARD;

Service/Attempt Date: 15-Feb-2008

Bond Amount: 4,500.00; **Bond Text:** STATE APPEARS BY ASSISTANT PA HICKS. DEFT APPEARS BY COUNSEL STEVE RICHEY. DEFT DOES NOT APPEAR IN PERSON. CAPIAS WARRANT ISSUED. BOND FIXED AT $4500.00. GH/DIV I (CMM)

Bond Set

BOND FIXED AT $4500.00. GH/DIV I (CMM)

15-Feb-2008 **Bond-Surety Bond Posted**

SURETY BOND OF $4500 POSTED BY A-JOY CLOUD BAIL BONDING, RETURNABLE FOR 02 25 08 AT 1:30 P.M., DIV I. (MLB)

19-Feb-2008 **Arraignment Scheduled**

Scheduled For: 25-Feb-2008; 1:30 PM; GENE HAMILTON; **Setting:** 0; Boone

Warrant Served

Document ID 08-FAWR-474; Served To – FRYE, GALIN EDWARD; Server – BOONE COUNTY SHERIFF'S DEPARTMENT; Served Date – 15-Feb-08; Served Time – 00:00:00; Service Type – Sheriff Department; Reason Description – Served

25-Feb-2008 **Arraignment Held**

STATE APPEARS BY ASST. PA HICKS. DEFT. APPEARS IN PERSON AND BY COUNSEL, JENNIFER BUKOWSKI. FORMAL ARRAIGNMENT WAIVED AND PLEA OF NOT GUILTY ENTERED. GH/DIV I (DB)

03-Mar-2008**Hearing/Trial Cancelled**

PLEA OF GUILTY ENTERED

Scheduled For: 11-Mar-2008; 9:00 AM

Guilty Plea

Guilty Plea Entered

STATE APPEARS BY ASST. PA WILSON. DEFT. APPEARS IN PERSON AND BY COUNSEL, MICHAEL COLES. PLEA OF NOT GUILTY PREVIOUSLY ENTERED WITHDRAWN AND PLEA OF GUILTY ENTERED. SENTENCE ASSESSMENT REPORT ORDERED RETURNABLE APRIL 30, 2008. FINAL DISPOSITION SET FOR 10:30 A.M. ON MAY 5, 2008, DIV I. GH/DIV I (DB)

Scheduled For: 03-Mar-2008; 10:30 AM; GENE HAMILTON; **Setting:** 0; Boone

DEFT. MUST APPEAR

Sent Assessment Report Ordered

Final Disp/Sent Hrng Scheduled

Scheduled For: 05-May-2008; 10:30 AM; GENE HAMILTON; **Setting:** 0; Boone

05-May-2008 **Defendant Sentenced**

STATE APPEARS BY ASST. PA HICKS. DEFT. APPEARS IN PERSON AND BY COUNSEL. M. BYRNE. COURT FINDS THAT PLEA OF GUILTY HAS BEEN FREELY AND VOLUNTARILY ENTERED WITH UNDERSTANDING OF NATURE OF CHARGE, RANGE OF PUNISHMENT AND CONSEQUENCES THEREOF. COURT FURTHER FINDS THAT DEFT. HAS KNOWINGLY AND INTELLIGENTLY WAIVED CERTAIN RIGHTS AND THAT DEFT. HAS HAD EFFECTIVE ASSISTANCE OF COUNSEL. COURT ACCEPTS PLEA OF GUILTY. SENTENCE ASSESSMENT REPORT RECEIVED FILED AND CONSIDERED. PUNISHMENT FIXED AT 3 YEARS MDOC. ALLOCUTION JUDGMENT AND SENTENCE. SHERIFF AUTHORIZED ONE DEPUTY TO DELIVER DEFT. TO DOC. DEFT. GIVEN

CREDIT FOR ALL TIME SERVED. CVCJ IN ACCORDANCE WITH LAW. EXECUTION OF SENTENCE SUSPENDED UNTIL 10:00 A.M. ON MAY 12, 2008, AT WHICH TIME DEFT. SHALL SURRENDER TO BOONE COUNTY SHERIFF AT BOONE COUNTY JAIL. DEFT. ADVISED OF RIGHTS UNDER SUPREME COURT RULE 24.035 AND INQUIRY CONDUCTED AS TO ASSISTANCE OF COUNSEL. COURT FINDS NO PROBABLE CAUSE TO BELIEVE THAT THE DEFT. HAS NOT BEEN EFFECTIVELY REPRESENTED BY COUNSEL. GH/DIV I (DB)

Scheduled For: 05-May-2008; 10:30 AM; GENE HAMILTON; **Setting:** 0; Boone

Judgment CVC $46 – Other
Judgment Against: GALINE FRYE;
Amount: $46.00; Satisfied Date:
Associated To: GALIN E FRYE
Costs Ordered to Def
Filed By: GALIN E FRYE
Judgment Pub Defender Entered
Judgment Against: GALIN FRYE;
Amount: $100.00; **Satisfied Date**:
Associated To: GALIN E FRYE
Record of Traffic Disp Issued

The Traffic Disposition was sent electronically to DOR and MSHP for charge number 1 violation 4668900 – Oper Motor Vehicle On Hwy While Driv License/Priv Revoked (Suspended For Points). The charge was disposed as Guilty Plea

30-Jun-2008 **Judge/Clerk – Note**

Criminal Bill of Costs sent to Office of Administration (lb)

11-Aug-2008 **Transcript Filed**

[Docket entries from Mr. Frye's post-conviction case:]

09-Jun-2008 **Pet Filed in Circuit Ct**

10-Jun-2008 **Order**

Movant given leave to proceed in forma pauperis. State Public Defender appointed. Cause transferred to trial request docket for setting at 9:00 am August 4, 2008 Division I. GH/I (mln)

Trial Setting Scheduled

Scheduled for: 04-Aug-2008; 9:00 am; Gene Hamilton; **Setting:** 0; Boone

17-Jun-2008 **Entry of Appearance Filed**

Filed by: Karl W Hinkebein

Motion for Extension of Time

Motion for thirty-day extension of time to file amended motion. (mln)

Filed by: Karl W Hinkebein

20-Jun-2008 **Order**

Order in Accordance with Order signed this date.GH/I (em)

04-Aug-2008 **Judge Assigned**

08-Aug-2008 **Court Trial Scheduled**

Scheduled For: 03-Oct-2008; 9:00 am; Gene Hamilton; **Setting** 2; Boone

02-Sep-2008 **Application Filed**

For Writ of Habeas Corpus Ad Testificandum filed. (mln)

05-Sep-2008 **Amended Motion/Petition Filed**

Amended Motion under Rule 24.035 filed. (mln)

Filed by: Karl W Hinkebein

03-Oct-2008 **Order**

Movant appears in person and by counsel Karl Hinkebein. Respondent appears by counsel Stephanie Morrell. Parties announce ready. Movant adduces evidence and rests. Respondent offers no evidence. Evidence closed. Parties to submit proposed finding of fact and conclusions of law within 30 days. Cause passed to 10:30 am November 3, 2008 Division I for submission only. GH/I (mln)

Scheduled For: 03-Oct-2008; 9:00 am; Gene Hamilton; **Setting** 2; Boone

Motion Hearing Scheduled

Scheduled For: 03-Nov-2008; 10:30 am; Gene Hamilton; **Setting:** 0; Boone

03-Nov-2008 **Cause Taken Under Advisement**

Cause submitted and taken under advisement. GH/I (em)

Filed By: Gene Hamilton

18-Nov-2008 **Other Final Disposition**

Scheduled For: 03-Nov-2008; 10:30 am; Gene Hamilton; **Setting:** 0; Boone

Propsd/Sugg Findings of Fact

Propsed Findings of Fact, Conclusions of Law and Judgment filed. (mlm)

Filed By: Stephanie M Morrell

18-Nov-2008 **Other Final Disposition**

Findings of Fact, Conclusions of Law and Judgment in accordance with same signed this date. Costs taxed vs. Boone County, MO. GH/I (em)

14-Jan-2009 **Filing:**

Order of Missouri Court of Appeals allowing Appellant to file Notice of Appeal as a poor

person. (mln)

20-Jan-2009 **Notice of Appeal Filed**
Filed By: Ellen H Flottman

26-Jan-2009 **Ackn Notice of Appeal Filed**

29-Jan-2009 **Correspondence Filed**
Request for Legal File Documents. (mln)
(mailed 02/03/09. Request for criminal file documents forwarded to criminal division)
Filed By: Ellen H Flottman
Correspondence Filed
Request for Transcript Filed. (mln)
Filed By: Ellen H Flottman

Charge Code Number: 4668906.0 [File stamped:
"Filed Boone County
AUG 14 2007
Christy Blakemore
Clerk Circuit Court, Columbia, MO]

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

STATE OF MISSOURI,	)	
	)Case No. 07BA-CR03869	
	)	
vs.	)	
GALIN EDWARD FRYE	)	
DOB: 07/09/1975	)	OCN:
SSN: 493-78-6353	)	PA File No. 019203239

COMPLAINT

The Prosecuting Attorney of the County of Boone, State of Missouri, upon information and belief, charges that the defendant:

in violation of Section 302.321, RSMo, committed the class D felony of driving while license was revoked, punishable upon conviction under Sections 302.321, 558.011, and 560.011, RSMo, in that on or about the 9th day of August, 2007, in the County of Boone, State of Missouri, the defendant operated a motor vehicle on a highway, on Creasy Springs Road, during a time when defendant's operator's license was revoked under the laws of this state, and acted with criminal negligence with respect to knowledge of the fact or knew or was aware that defendant's operator's license was revoked, and

on or about the 21st day of May, 2004, defendant was convicted of driving while revoked in the

Thirteenth Judicial Circuit Court of Boone County, State of Missouri, for events which occurred on 29th day of December, 2003, and

on or about the 20th day of April, 2006, defendant was convicted of driving while revoked in the Thirteenth Judicial Circuit Court Boone County, State of Missouri, for events which occurred on 15th day of October, 2005, and

on or about the 10th day of February, 2006, defendant was convicted of driving while revoked in the Thirteenth Judicial Circuit Court Boone County, State of Missouri, for events which occurred on 10th day of August, 2005.

The facts that form the basis for this information and belief are contained in the attached statement(s) to facts concerning this matter, which statements are made a part hereof and are submitted herewith as a basis upon which this court may find the existence of probable cause that a crime has been committed.

Daniel K. Knight, Prosecuting Attorney
of the County of Boone,
State of Missouri, by

/s/ Stephanie Morrell
Stephanie Morrell, Bar No. 52231
Assistant Prosecuting Attorney

TICKET FOR: 8-21-2007

Guilty Plea and Sentencing Hearing

March 3, 2008

* *

THE COURT: Case Number 3869, State vs. Galen Edward Frye.

MR. COLES: Yes, your Honor.

THE COURT: You are Galen Edward Frye?

THE DEFENDANT: Yes, sir.

THE COURT: And you appear here with Mr. Coles. He's an attorney who has been appointed to represent you. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: What's the matter before the Court?

MR. COLES: Your Honor, we wish to withdraw our plea of not guilty and enter a plea of guilty on this matter. We would note for the Court that this will be in the way of an open plea.

THE COURT: Okay. You heard what your attorney said, Mr. Frye. Is that what you want to do?

THE DEFENDANT: Yes, sir.

THE COURT: Please raise your right hand and be sworn.

(THE WITNESS WAS SWORN BY DEPUTY CLERK OF COURT SEVERS.)

* * *

THE COURT: Please take the witness stand.

(The witness complied.)

* * *

GALEN EDWARD FRYE

being first duly sworn, testified as follows:

* * *

EXAMINATION

BY THE COURT:

Q. Mr. Frye, please state your full name.

A. Galen Edward Frye.

Q. Do you understand that by pleading guilty today you're waiving up certain rights that you have?

A. Yes.

Q. Do you understand that among those rights is the right to be tried by a jury?

A. Yes.

Q. Do you understand that if you were tried by a jury, you might be acquitted, found not guilty of this offense?

A. Yes.

Q. But do you understand that there is no acquittal from a plea of guilty?

A. Yes.

Q. Do you understand that if you stood a jury trial, the prosecuting attorney would have to bring her witnesses into the courtroom, they would have to testify, and you and your attorney could be here and cross-examine those witnesses?

A. (Nodding head.)

Q. Do you understand the verdict of the jury would have to be unanimous, all 12 people would have to agree?

A. Yes.

Q. Do you understand the burden of proof would be on the State and that burden of proof would be to prove you guilty beyond a reasonable doubt?

A. Yes.

Q. Do you understand that you'd have the right to present evidence on your own behalf if you wanted to?

A. Yes.

Q. Do you understand that, as the defendant, you'd would have a right to testify if you wanted to, but no one could force you to testify?

A. Yes.

Q. Do you understand that even if you were found guilty by the jury you'd have a right to appeal this Court's decisions?

A. Yes.

Q. Do you understand that if an appellate court found that this trial court had done something wrong, the case might be reversed and you might be released outright?

A. Yes.

Q. Now, knowing those rights to a jury trial, do you desire to waive them today and plead guilty?

A. Yes.

Q. You're charged in the Information with the Class D felony of driving while your license was revoked. Do you understand that the range of punishment for that offense is by a fine, a jail term, a combination of a fine or jail term, or up to four years in the Department of Corrections?

A. Yes.

THE COURT: State intend to make a recommendation, Ms. Wilson?

MS. WILSON: Judge, I understand that this is an open plea.

THE COURT: I'm sorry?

MS. WILSON: This is an open plea.

THE COURT: Okay. So there is no recommendation?

MS. WILSON: There is not.

THE COURT: And that was your understanding, Mr. Coles?

MR. COLES: Yes, your Honor.

BY THE COURT:

Q. Okay. And was that your understanding, Mr. Frye?

A. Yes.

Q. So you understand the full range of punishment still available to me?

A. Yes.

Q. And do you understand that among the things that I could do is to sentence you up to four years and require that you do the time?

A. Yes.

Q. Do you understand that another option would be to sentence you to such a sentence but suspend the execution of it and put you on probation?

A. Yes.

Q. But do you understand another option will be not to impose a sentence but just to put you on probation?

A. Yes.

Q. But do you understand the final decision is up to me?

A. Yes.

Q. And do you understand that if I put you on probation under either set of circumstances, a suspended execution or a suspended imposition, there's a requirement that you do two days in the county jail?

A. Yes.

Q. Has anybody promised you anything that's not been stated here in order to get you to plead guilty against your will?

A. No.

Q. Has anyone threatened you or coerced you in any manner in order to get you to plead guilty against your will?

A. No.

THE COURT: Is there any question of the legality of the arrest or of any search and seizure, Mr. Coles?

MR. COLES: No, your Honor.

BY THE COURT:

Q. Did you make any statements to the police about these matters, Mr. Frye?

A. No, sir.

Q. Looking at the Information, it alleges that this occurred on or about the August the 9th, 2007, here in Boone County, Missouri. And it alleges that at that place you operated a motor vehicle on a highway, on Creasy Springs Road, during a time when your driver's license was revoked under the laws of this state.

Is that true?

A. Yes, sir.

Q. And it alleges you knew that your driver's license was revoked.

Is that true?

A. Yes.

Q. It alleges three prior offenses. It alleges that on the 21st day of May, 2004, you were convicted of diving while revoked in the 13th Judicial Circuit Court of Boone County, Missouri, for events occurring on the 29th of December, 2003.

Is that true?

A. Yes.

Q. Were you represented by an attorney at that time?

A. Yes.

Q. It further alleges that on the 20th day of April, 2006, you were convicted of driving while revoked in the 13th Judicial Circuit Court, Boone County, Missouri, for events occurring on the 15th day of October, 2005.

Is that true?

A. Yes.

Q. And you were represented by counsel AT that time?

A. Yes.

Q. It further alleges that on the 10th day of February, 2006, you were convicted of driving while revoked here in Boone County, Missouri, for events occurring on the 10th day of August, 2005.

Is that true?

A. Yes.

Q. Were you represented by an attorney at that time?

A. Yes.

Q. You've been represented in this matter by Mr. Coles. Have you had ample opportunity to meet with him and to discuss the case with him?

A. Yes.

Q. Is there anything you have asked him to do that he has refused to do?

A. No.

Q. Do you have any complaint about the way he's represented you?

A. No.

Q. Have you had any drug or alcohol today causing you to plead guilty against your will?

A. No.

THE COURT: Any other questions now, Mr. Coles?

MR. COLES: No, your Honor.

THE COURT: Has there been discovery?

MR. COLES: There has.

THE COURT: And do you believe that this plea of guilty is in your client's best interest?

MR. COLES: I do, your Honor.

BY THE COURT:

Q. Now, you understand, Mr. Frye, that Mr. Coles can give you advice and make recommendations to you, but it has to be your decision as to whether you plead guilty. Do you understand that?

A. Yes.

Q. And is this your decision to plead guilty?

A. Yes.

THE COURT: Okay. You may step down.

State appears by Assistant Prosecuting Attorney Wilson. Defendant appears in person and by Counsel Michael Coles. Plea of not guilty previously entered withdrawn and plea of guilty entered.

SAR ordered returnable - -

Where have you lived most of your life, Mr. Frye?

THE DEFENDANT: Sedalia, Missouri.

THE COURT: Where?

THE DEFENDANT: Most of my life in Sedalia, Missouri.

MR. COLES: But you currently live in the St. Louis area.

THE DEFENDANT: Yeah, I live in St. Louis.

THE COURT: Returnable April 30, 2008.

Final disposition set for 10:30 a.m., May 5, 2008, Division I.

Please talk to the representatives from the Board of Probation and Parole so they can get started on the SAR.

(Hearing adjourned.)

* * *

SENTENCING HEARING
May 5, 2008

* * *

THE COURT: Case Number 3869, State vs. Galen Edward Frye.

You are Galen Edward Frye?

THE DEFENDANT: Yeah. Yes.

THE COURT: And you appear here with Mr. Byrne. He's an attorney who has been appointed to represent you on this matter. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: State appears by Assistant Prosecuting Attorney Hicks. Defendant appears in person and by Counsel Michael Byrne.

Court finds that plea of guilty has been freely and voluntarily entered, with understanding of nature of charge, range of punishment, and the consequences thereof. Court further finds that the defendant has knowingly and intelligently waived certain rights and that the defendant has had effective assistance of counsel.

Court accepts plea of guilty.

I had ordered an SAR which has now been returned. Are there additions or corrections that need to be made, Mr. Byrne?

MR. BYRNE: Your Honor, I'm not sure if the SAR shows Mr. Frye being at the community college, but he is currently enrolled in St. Louis Community College, Forest Park. Forest Park Community College.

THE COURT: Okay.

MR. BYRNE: And I wanted you to have note of that if it wasn't in the SAR. If it is in the SAR, then I don't need to correct it.

THE COURT: Okay. Recommendation by the State.

MR. HICKS: Your Honor, this is an open plea. Our recommendation is three and defer. We would request 10 days shock in the Boone County Jail.

MR. BYRNE: And your Honor, we would ask that - - we see that - - This is Mr. Coles' case. He sees that the recommendation is for a shock 120. We would ask instead that he, that Mr. Frye serve 10 days shock in the Boone County Jail and then be placed on probation.

Mr. Frye is currently enrolled in community college. He is trying to better himself. And I was actually mistaken, your Honor. I believe that there's actually - - and Mr. Frye is actually currently employed. And I believe at the time of the SAR he was unemployed. And Mr. Frye can provide the Court with the name of his employer if the Court so desires.

The other matter that I wanted to address with the Court is, no matter what happens, we would ask for a stay of execution of any shock time until after Mr. Frye's exams. He has been in college this whole semester and I believe his - - his exams are this week. So we would ask for a stay of execution until at least Saturday, May 10th.

And as I said, your Honor, we would ask that, instead of the 120-day shock time, that he be - - that he do 10 days in the Boone County Jail.

THE COURT: Anything else, Mr. Hicks?

MR. HICKS: No, your Honor.

THE COURT: SAR received, filed, and considered.

Punishment fixed at three years Missouri Department of Corrections.

Is there any legal cause why judgment and sentence should not now be pronounced upon you?

Hearing none, it is the judgment and sentence of the Court that you be confined in an institution to be designated by the Department of Corrections of the State of Missouri for a period of three years, unless sooner discharged by due operation of law.

Allocution, judgment, and sentence:

Sheriff authorized one deputy to deliver defendant to Department of Corrections. Defendant given credit for all time served. Civil judgment in accordance with law.

Execution of sentence suspended until 10 a.m., May 12, 2008, at which time defendant shall surrender to Boone County Sheriff at Boone County Jail.

It's my duty to advise you of your rights under Supreme Court Rule 24.035.

That rule states that a person convicted of a felony on a plea of guilty and delivered to the custody of the Department of Corrections who claims that the conviction or the sentence imposed violates the Constitution and laws of this state or the Constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the Court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief from the sentencing court pursuant to the provisions of this rule.

This rule provides the exclusive procedure by which that may be done in the sentencing court for the claims as are set forth in the rule.

If you desire to file that, it has to be filed within 180 days of the time you're delivered to the custody of the Department of Corrections.

No cost deposit will be required from you. If you don't have the money to hire a lawyer, a lawyer would be appointed at that time to represent you on the matter.

It's also my duty to inquire as to the assistance of your attorneys. Do you still feel that you have been effectively represented?

THE DEFENDANT: Yes.

THE COURT: Defendant advised of rights under Supreme Court Rule 24.035. Inquiry conducted as to assistance of counsel. Court finds no probable cause to believe the defendant has not been effectively represented by Counsel.

MR. BYRNE: Your Honor, can I just confirm? I got May 12th, 2008, for - -

THE COURT: 10 o'clock.

MR. BYRNE: At 10 a.m.? Thank you, your Honor.

THE COURT: He's to turn himself into the sheriff of Boone County, at the Boone County Jail. If not there will be a warrant out for him. Hopefully two.

MR. BYRNE: Thank you, your Honor.

(Hearing adjourned.)

* * *

IN THE
CIRCUIT COURT OF BOONE COUNTY
STATE OF MISSOURI

GALIN E. FRYE,	)	
	)	
Movant,	)	
	)	
vs.	)	No. 08BA-CV03050
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

AMENDED MOTION UNDER RULE 24.035

Comes now Movant, by and through counsel, Karl Hinkebein, and for his amended motion to vacate, set aside or correct the judgment and sentence under Supreme Court Rule 24.035, and states as follows:

1. Place of Detention: Moberly Corr. Center, Reg. No. 514200.

2. Name and location of Court which imposed sentence: Boone County Circuit Court, Columbia, Missouri.

3. Criminal case number and offense: 07BA-CR03869-01; class D felony driving while revoked. § 302.321.[1]

4.a. Date and terms of sentence: May 5, 2008; three years imprisonment.

4.b. DOC delivery date: May 15, 2008.

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[1] All statutory citations are RSMo, 2000.

5.-7. Judgment followed guilty plea. No appeal was taken.

8. Movant's guilty plea was entered in an unknowing, involuntary and unintelligent manner because he was denied his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution when his plea attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would under the same or similar circumstances and as a result thereof, Movant was prejudiced. Specifically, plea counsel Michael Coles unreasonably failed to inform Movant of the state's plea offer of ninety days incarceration in the Boone County Jail on an amended misdemeanor driving-while-revoked charge. Had counsel informed Movant of the offer, he would have accepted it and pled thereto.

9. Facts & Evidence in Support of Foregoing Claims:

Plea counsel Michael Coles unreasonably failed to inform Movant of the state's plea offer of ninety days incarceration in the Boone County Jail on an amended misdemeanor driving-while-revoked charge. Had counsel informed Movant of the offer, he would have accepted it and pled thereto.

On August 14, 2007, a criminal complaint was filed in the Associate Circuit Court of Boone County charging Movant with class D felony driving while revoked, § 302.321. The preliminary hearing was waived on January 4, 2008, and the cause bound over to the circuit court. On January 7, 2008, a class D felony driving-while-revoked information was filed.

On November 15, 2007, prior to the cause being bound over, Assistant Boone County Prosecutor Brett Nelson sent an plea offer letter to Movant's counsel, Michael Coles, stating the state's plea offer as two options: (1) a three-year-prison-term recommendation with the state deferring to the Court as to probation, and the state recommending 10 days "shock" incarceration in the Boone County Jail should the Court grant probation; or (2) ninety days to serve in the county jail on an amended misdemeanor driving-while-revoked charge. The offer was stated to expire on December 28, 2007.

Movant was never informed by counsel of the state's offer, or otherwise aware such an offer had been made.[2] On March 3, 2008, Movant entered an open plea to class D felony driving while revoked. He was sentenced to three years' imprisonment on May 5, 2008. Reasonably competent counsel would have informed Movant of the state's plea offer. Had counsel done so, Movant would have accepted the state's plea offer of ninety days to serve in the county jail on an amended misdemeanor driving-while-revoked charge. Thus, Movant would have completely avoided a felony charge and conviction in the circuit court; instead he would have pled to an amended misdemeanor charge in the associate circuit court in front of the Honorable Christine Carpenter. A resulting reasonable probability would have existed that Judge Carpenter would have accepted the plea bargain to the amended misdemeanor charge, Movant would have pled thereto and been sentenced in accordance with the

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[2] Movant did not learn of the existence of the state's November 15, 2007 offer until informed of it by post-conviction counsel.

plea offer, and consequently he would have avoided a felony conviction and would have served only ninety days in the county jail rather than three years in prison.

In support of this claim, Movant will rely on: the testimony of defense counsel, Michael Coles, 16416 Westknoll, Chesterfield, MO 63017; the testimony of Movant, Galin E. Frye #514200, Moberly Correctional Center, PO Box 7, Moberly, MO 65270; the testimony of the Hon. Christine Carpenter, Associate Circuit Judge, 705 E. Walnut, Columbia, MO 65201; the testimony of Boone County Assistant Prosecutor Brett Nelson, 705 E. Walnut, Columbia, MO 65201; and the underlying criminal file and transcript in Boone County Case Number 07BA-0CR03869-01.

10.-14. Prior to this motion, Movant has not filed any other petitions, applications or motions regarding this conviction and no grounds from paragraph 8 has been previously raised.

15. Movant was represented by an attorney during preliminary hearing, arraignment, plea, and sentencing. No appeal or other motions or petitions have been filed with respect to this conviction.

16. Movant was represented in the associate circuit court, at his arraignment and his guilty plea by Michael Coles, 16416 Westknoll, Chesterfield, MO 63017. He was represented at sentencing by Michael Byrnes, 601 E. Walnut, Columbia, MO 65201.

17. Movant is currently not serving any other sentences than the one here challenged.

18. The Court has allowed Movant to proceed *in forma pauperis*.

WHEREFORE, based on the foregoing, Movant prays this Court grant him an evidentiary hearing, take judicial notice of the underlying files, and sustain his motion to vacate his judgment and sentence in Boone County Case No. 07BA-CR03869-01.

Respectfully submitted,

Karl Hinkebein, MO Bar #41666
Attorney for Movant
1000 W. Nifong, Bldg. 7, Suite 100
Columbia, MO 65203
573-882-9855

CERTIFICATE OF SERVICE

I, Karl Hinkebein, hereby certify that on this 5th day of September, 2008, a true and correct copy of the foregoing was mailed postage prepaid to Stephanie Morrell, Boone County Assistant Prosecutor, 705 E. Walnut Street, Columbia, MO 65201.

Karl Hinkebein

MOTION FOR POSTCONVICTION RELIEF
October 3, 2008
* * *

MR. HINKEBEIN: Good morning, your Honor.

THE COURT: Has Frye been brought?

MR. HINKEBEIN: Say that again.

THE COURT: Is Frye coming?

MR. HINKEBEIN: He should be, your Honor. He is currently in -- where is he currently?

THE COURT: Moberly, it says. That's what your Amended Motion said.

MR. HINKEBEIN: Can I see the file for a moment, Judge?

Habeas corpus writ signed September 3.

THE COURT: Do you know where he is?

MARSHAL WERNER: I'm calling right now. They don't have him down there and they do not see any DOC officers down there, either.

MR. HINKEBEIN: Last time, Judge, the last hearing we had here, they got lost in Columbia.

THE COURT: I think somebody needs to call Moberly. Either you call, Les, or have Marla call and see where the heck they are.

MARSHAL WERNER: Okay.

MR. HINKEBEIN: Can I use my cell phone to call my office, Judge?

THE COURT: Sure.

MR. HINKEBEIN: I'll have them call and check on that.

MARSHAL WERNER: They think DOC just got here, so I'll go down.

THE COURT: Okay.

(Off the record.)

* * *

THE COURT: Case Number 3050, Frye vs. State of Missouri.

Mr. Hinkebein on behalf of the movant. Is the movant ready to proceed?

MR. HINKEBEIN: We are, your Honor.

THE COURT: Ms. Morrell on behalf of the respondent. Is the respondent ready to proceed?

MS. MORRELL: Yes, your Honor.

THE COURT: You may present your evidence, Mr. Hinkebein.

MR. HINKEBEIN: As a preliminary matter, I would ask that the Court take judicial notice of the underlying criminal case file, which is Boone County Case Number 07BA-CR03869-01.

THE COURT: Judicial notice will be taken.

MR. HINKEBEIN: Movant calls Galin Frye.

THE COURT: Okay. Please come forward, raise your right hand and be sworn.

(THE WITNESS WAS SWORN BY THE COURT.)

* * *

THE COURT: Okay. Please take the witness stand.

(The witness complied.)

* * *

THE COURT: You may proceed, Mr. Hinkebein.

MR. HINKEBEIN: Thank you, your Honor.

MOVANT'S EVIDENCE

* * *

GALIN EDWARD FRYE

Being first duly sworn, testified as follows:

* * *

DIRECT EXAMINATION

BY MR. HINKEBEIN:

Q. State your name, please.

A. Galin Edward Frye.

Q. And what's your current address? Just where are you incarcerated?

A. Moberly Correctional Center.

Q. Okay. Obviously, you're incarcerated there. For what offense or offenses are you incarcerated?

A. Driving while revoked.

Q. Is that the only offense?

A. Yes.

Q. The only sentence you're serving?

A. Yes.

Q. What sentence are you serving?

A. Three years.

Q. And was that imposed after a plea?

A. Yes.

Q. And that case that I just had judicial notice, the Judge take judicial of ending 3859, that's that case; correct?

A. Yes.

Q. Now, you mentioned that there was a plea. What kind of plea was it?

A. An open plea.

Q. Okay. Were you represented by counsel --

A. Yes.

Q. -- at that plea?

A. Yes.

Q. By whom were you represented?

A. I don't know his name.

Q. Michael Coles?

A. He wasn't there.

Q. Okay. Michael Byrne?

A. Yes.

Q. Okay. So Mr. Byrne was the attorney at the actual plea hearing; correct?

A. I believe so.

Q. But who was your attorney in the case?

A. Michael Coles.

Q. And he was with the Public Defender's Office, was he not?

A. Yes.

Q. As far as the -- The record shows the complaint was filed in your case on August 14th, 2007. And after that Mr. Coles was appointed to your case?

A. Yes.

Q. And if the record shows the plea was March 3 of 2008, would you disagree with that?

A. March 5th, I believe.

Q. May 5th is the sentencing. March --

A. Oh, yeah. March 3rd.

Q. March 3rd is the plea. Okay. And you've had a chance to look at the Amended Motion we filed in this case; right?

A. Yes.

Q. And it concerns a plea offer you maintained was not sent to you?

A. Yes.

Q. I'm handing you what's been marked Movant's Exhibit Number 1. Have you seen that before?

A. Just after you sent it to me.

Q. Okay.

A. While I was incarcerated.

Q. You've seen the copy of it that I sent you?

A. Yes.

Q. As far as -- as far as the offer that's stated in that letter, it's a letter; correct?

A. Yes.

Q. When is it dated?

A. It's dated November 15th, 2007.

Q. Okay. And so the information in that letter was new to you when I sent it to you; correct?

A. Yes.

Q. Now, the offer in the letter is -- there's two alternative offers; correct?

A. Yes.

Q. One of which is 90 days to serve on an amended misdemeanor?

A. Yes.

Q. Had you been made aware of that offer, what would you have done?

A. I would have accepted it.

Q. And you would have pled thereto?

A. Yes.

MR. HINKEBEIN: No further questions.

THE COURT: Cross-examination.

MS. MORRELL: Yes, your Honor.

* * *

CROSS-EXAMINATION

BY MS. MORRELL:

Q. Mr. Frye, you have several prior felony convictions. Is that right?

A. Two prior felony convictions.

Q. Do you have a felony for sealing in 1993?

A. I believe. Okay. I believe so.

Q. Okay. And another felony for receiving stolen property in 1995?

A. Yes.

Q. And a felony for -- a controlled substance felony in 1995?

A. Yes.

Q. And another felony in 1998 for possession of a controlled substance?

A. Yes.

Q. And you have a misdemeanor conviction from 2003 for domestic assault?

A. Yes.

Q. You have another one from 2004 for a misdemeanor domestic assault?

A. Yes.

Q. You have a prior from 2005 for passing a bad check?

A. Yes.

Q. And then you have several prior misdemeanor driving while revokeds. Is that right?

A. Yes.

Q. Now, you stated that you made an open plea in this case to the felony of driving while revoked?

A. Yes.

Q. Now, at the time that this case was pending, you were residing in St. Louis. Is that right?

A. Yes.

Q. And you -- Mr. Hinkebein stated that the complaint in this case was filed in August of '07. Is that your memory?

A. Yes.

Q. Okay. And you failed to appear in September of '07, is that right, on the court date, September 7th of '07?

A. I believe I called down here and I got a continuance.

Q. But did not appear in person?

A. No. But there was no warrant issued for my arrest. It wasn't a failure to appear.

Q. Okay. But you did not appear in court on September 7th --

A. True.

Q. -- here in Boone County?

Okay. And on November 9th of 2007, you did not appear in person on that date?

A. That's true.

Q. And it was January 4th of '08 where you waived your preliminary hearing and went to Circuit Court. If the record reflects that, would you dispute that?

A. Yeah. That's what it says in the letter. I was supposed to waive it.

Q. And that was the next time that you appeared in court?

A. When was that?

Q. January 4th of 2008.

A. I didn't appear in court January 4th.

Q. On the date that you waived your preliminary hearing, you did not appear in court on that date?

If the record reflects that you appeared to waive your preliminary hearing, would you dispute that?

A. I don't remember if I was in court. I know my preliminary hearing was waived. I don't remember if it was January 4th or not.

Q. Okay. And on January 14th, you failed to appear, and I believe that a capias was issued on that date. And there was allegedly some misunderstanding on your court date. Is that right?

A. Yes, there was. I was sent, by the Public Defenders Office, I was sent the wrong notice to come to court and I had to bond out.

Q. Okay. There was another capias that was issued on January 28th of 2008 --

A. That was --

Q. -- where you failed to appear?

A. That was another wrong mix-up.

Q. And then you pled on March 3rd of 2008?

A. Yes.

Q. Okay. Now, Exhibit 1 -- and Mr. Hinkebein showed you this. And this offer letter was from the prosecutor's office. Is that correct?

A. Yes.

Q. Okay. And that was a letter that went to Mr. Coles. Is that right?

A. I believe so. I'm not –

Q. Is it addressed to Mr. Coles?

A. Yes.

Q. At the Public Defender's Office?

A. Yes.

Q. And it references your case. Is that right?

A. Yes.

Q. Okay. And the offer letter again is from November 15th of 2007. Is that right?

A. Yes.

Q. And at the bottom of that letter, after it discusses the two alternative offers, does the letter state when the offer will expire?

A. Yes.

Q. Okay. And when did that offer expire?

A. At noon on December 28th.

Q. Of 2007?

A. 2007.

Q. Okay. And the prosecutor tells Mr. Coles that that's when the offer will expire if there's not an acceptance of the offer. Is that right?

A. Yes.

Q. Okay. And that was almost a year ago, give a couple months?

A. Yeah.

Q. Okay. And what you stated on direct is that, had you known about that offer, you would have accepted the misdemeanor offer. Is that right?

A. Of course.

Q. Okay.

MS. MORRELL: I have no further questions.

THE COURT: Redirect.

* * *

REDIRECT EXAMINATION

BY MR. HINKEBEIN:

Q. The record also shows that you did appear prior to -- on September 7, 2007. Do you recall that?

A. Yes.

Q. And that was for another continuance?

A. Yes.

Q. Now, you were living in St. Louis?

A. Yes. I was attending Forest Park Community College.

Q. Where were you actually living?

A. 4945 Magnolia Avenue, Apartment 2.

Q. And did you move in the period between September and December of 2007?

A. No.

Q. Did you change phone numbers in that period?

A. I think one time.

Q. Okay. When you did change phone numbers, did you -- Strike that. When you first met Mr. Coles, did you give him your address?

A. Yes.

Q. When the phone number changed, did you advise him of that?

A. There was a couple times I tried to call, but his message, his voice mailbox was always full. And I left numerous messages with the receptionist at the front of the building. I believe that's where they were at.

MR. HINKEBEIN: No further questions.

THE COURT: Recross.

MS. MORRELL: None, your Honor.

THE COURT: Okay. You may step down.

MR. HINKEBEIN: Michael Coles.

THE COURT: Please come forward, raise your right hand and be sworn.

(THE WITNESS WAS SWORN BY THE COURT.)

* * *

THE COURT: Please take the witness stand.

(The witness complied.)

* * *

THE COURT: You may proceed, Mr. Hinkebein.

MR. HINKEBEIN: Thank you, your Honor.

* * *

MICHAEL FRANCIS COLES

being first duly sworn, testified as follows:

* * *

DIRECT EXAMINATION

BY MR. HINKEBEIN:

Q. State your name, please.

A. Michael Francis Coles.

Q. And what's your current occupation?

A. I'm an attorney.

Q. Where are you currently at?

A. I just moved to the St. Louis County area.

Q. Okay. You were previously a public defender; correct?

A. That's correct.

Q. What office did you work out of?

A. Here in Columbia, the trial office.

Q. Okay. And in connection with that employment, do you know the movant in this case, Galin Frye?

A. I recall him, yes. I recalled the name when I first became aware of this PCR. I didn't recall his face as much as I do now that I see him.

Q. And you've been here for the -- for his testimony; correct?

A. Yes.

Q. And you've heard the testimony about an offer that was made. I'm handing you what's been marked Movant's Exhibit Number 1. Can you identify that?

A. This is clearly my copy, my file copy of the letter I would have received from Mr. Nelson at the prosecutor's office. And I can tell you that specifically because it was my practice to always, when I got an offer letter, to circle the offer, if you will, in yellow highlighter and to put a flag on it. So this is clearly my copy of the letter, and I've obviously seen this and put those stickers on there.

Q. What's the date of the letter?

A. It's dated November 15th of '07.

Q. The public defender has a stamp. I'm not sure. Does this one have a stamp?

A. It does. It looks like we received this, Counsel -- this would typically, unless I'm mistaken, that's our date stamp. The people at the front window, when the mail comes from the prosecutor's office, it doesn't come through the mail. It comes by hand delivery because we're so close. They would stamp it and then put it in the mailboxes.

Q. Okay. So it shows received what date?

A. The 19th. I probably wouldn't have gotten this until two or three days later.

Q. Okay. Now, Mr. Frye maintains he was never made aware of this offer. What was the offer?

A. Mr. Frye recited it correctly. It was three and defer on a felony with ten days shock in the Boone County Jail, or 90 days to serve, which means 90

days in the Boone County Jail on an amended misdemeanor to the Boone County Jail.

Q. Okay. And as far as the driving while revoked, it's ordinarily a misdemeanor; right?

A. Correct. Well --

Q. Unless you have --

A. -- until it reachers [sic] a certain level.

Q. Yeah.

A. I think this was a D felony.

Q. And he qualified and, obviously, it was a felony DWR?

A. That's how it's charged, and I believe that it was, you know, it was not improperly charged.

Q. Okay. Do you know if he was informed of --

A. Counsel, we've talked about this on the phone. I have wracked my brain to try to remember what happened in Mr. Frye's case. I can tell you that I do remember that communication -- I'm not suggesting through faults of his own, but he lived in St. Louis, and communication -- I believe I had different phone numbers from time to time. I'm not sure if I communicated this to him or not, simply because I don't remember him being in court with me as often as most of my other clients; that he was from St. Louis, and that I think that he missed court a few times. And I don't believe I saw him again until after this offer would have been revoked by operation of the language of it, of the letter.

Q. Okay. You've had a chance -- I'm sorry. Go ahead.

A. No, that's it.

Q. You've had a chance to look at your file in this case?

A. I have. I looked at it this morning. Thank you.

Q. Okay. I'm going to have you refer to it. On the left-hand -- right-hand side of the file is a -- is the

chronology, is it not, of contact and other events in the case?

A. On the left-hand side.

Q. I'm sorry. Left.

A. Left-hand side, that's correct, the case history.

Q. When does it show that you had last seen him prior to November 17th -- 19th?

A. November the 9th.

Q. Okay. So you'd seen him the last time --

A. Of '07. I'm sorry.

Q. Of '07. You'd seen him the last time prior to receiving this offer; correct?

A. That's correct. Oh, I take that back. He called me on the 8th. I take that back, Counsel. I misspoke. He called me on the 8th and advised me he was living in St. Louis and that he had exams on the 9th and that he couldn't be in court. So I appeared for him on the 9th of November. I stand corrected.

Q. Okay. The last time you contacted him, I guess.

A. That's correct. It would have been on the 8th, and then I appeared for him and explained the circumstances. I have to believe that we were still in Division IX at that time. And it was continued until January 4th, at 2:30, in Division IX.

Q. Okay. And the plea offer from the State expired December 28th at noon?

A. That's correct. I hadn't received that offer until a week later or so.

Q. Yeah. Okay. Did you see him between the time of November 19th and December 20 -- or November 19, 2007, and December 28th, 2007?

A. I don't believe I did.

Q. Okay. Now, there's another entry in your file, is there not, related to the offer?

A. Is it the yellow sheet, the docket sheet right there?

Q. Yeah.

A. Thank you.

Q. It's been marked Movant's Exhibit Number 2. Could you identify that, please?

A. I certainly can. This is a typical memo of case or yellow sheet that we would send up with the docket attorneys from the Public Defenders Office who was covering a particular docket. This sheet is dated January 4th of '08 for Division IX. That was not my docket at the time, so I would have sent this up with the docketing attorney. I'm not sure who that would have been, but from the records you could find out.

In this, it was set for preliminary hearing at 2:30, which is typically Judge Carpenter's preliminary hearing time in the afternoon. It indicates that he was not in custody. And this was set for a preliminary hearing.

I put on here, "Probably should," I left out the word "waive." I would have been writing this note as I talked to the docket attorney, so that I said, "Probably should waive."

"Talk to him" is my next. "He's from St. Louis. The 'rec' is tagged."

That would have been referring to the tag on exhibit --

Q. 1?

A. -- Number 1, yes.

"Also has a new misdemeanor. Go ahead and enter."

So he must have picked up a new case, and we were going to go ahead enter on his behalf at that appearance.

Now, that's the end of that answer.

Q. Okay. Now, the record said the recommendation is tagged. You're referring back to the letter?

A. To the letter.

Q. But that, that offer expired?

A. It did. And let me explain. Sometimes I can convince the prosecutors to extend their offers a little bit. Under the circumstances, I'd been having difficulty getting ahold of the client. He doesn't know about it. I just don't know. But sometimes I could talk them into extending it, even after it had expired.

But it would have been made more difficult by the fact that, according to this note, he had picked up a new case.

Q. Okay. As far as the -- You said that you had trouble contacting him. Did he have an address for you to --

A. There.

Q. Did he have an address for you?

A. I'm sure he did at some point.

Q. Did your --

A. I knew he was in St. Louis. He gave me different phone numbers from time to time, which I would have noted in the file. It looks like initially his phone number was (573) 489-9731. Then on another occasion he gave me (573) 489-9731.

Q. Okay. So those, you stated you --

A. And then he gave me a phone number at a later date. Oh, I called him on the 28th and noted in my file that his phone was not in service on the 28th.

Q. 28th of what?

A. Of January of '08.

Then I saw him again, probably, it looks like it was on February the 4th, or talked to him, let's put it that way, on February 4th. And he gave me a phone number of (573) 303-1508. So it's not untypical of our clients to have a lot of different phone numbers because they move a lot.

Q. Okay.

A. And it's not uncommon.

Q. I understand that. But there's no -- Do you agree there's no letter in there?

A. To him, no, there's not. There's not.

Q. Okay.

MR. HINKEBEIN: No further questions.

THE COURT: Cross-examination.

MS. MORRELL: Yes, your Honor.

* * *

CROSS-EXAMINATION

BY MS. MORRELL:

Q. Mr. Coles, the date of the letter from Mr. Nelson, who is the assistant prosecutor assigned to this case, was November 15th of 2007. Is that right?

A. That's correct.

Q. And the offer expired on December 28th, 2007?

A. That's correct.

Q. And, in fact, according to the letter, Mr. Nelson was going to subpoena witnesses for the preliminary hearing. Is that right?

A. That's his typical practice and that's what the letter states, and so I had no doubt that he would do that.

Q. Okay. And you stated "his typical practice." And you're referring to Mr. Nelson?

A. Yes.

Q. Is that right?

A. That's correct.

Q. Okay. And, in fact, Mr. Nelson also had a practice of, if a defendant picked up a new case, the previous offers would be terminated as well. Is that right?

A. That's correct. He would revoke the original offer if a new case was charged.

Q. And it was your understanding that Mr. Frye had picked up a new misdemeanor?

A. That's my understanding from looking at the note. I don't recall specifically what it was, but that was the information that was brought to my attention.

Q. And you stated that you saw Mr. Frye on -- or spoke to him on November 8th?

A. Yes.

Q. Is that right?

A. And I do remember that, because he called me and said he was in an exam. And he explained that he was taking courses or classes in one of the colleges in the St. Louis area. And so I went in and explained that the next day to Judge -- it would have been Judge Carpenter, but I don't know that for sure. And she understood the situation and continued it to January, past the exam season.

Q. But that was prior to receiving this letter. Your office received it on November 19th, 2007?

A. That's correct.

Q. Okay. And the offer to amend to a misdemeanor, that offer by the prosecutors's office expired on December 28, 2007?

A. According to the terms of the offer, yes.

Q. Right. So regardless, that offer still to this day does not exist?

A. I have to agree with that. Now, like I told Mr. Hinkebein, I sometimes could talk them into it if there had been a communication issue. But that, I don't remember that, me ever getting to that point.

MS. MORRELL: I have no further questions.

THE COURT: Redirect.

MR. HINKEBEIN: None.

THE COURT: Okay. May this witness be finally excused?

MR. HINKEBEIN: Yes, your Honor.

MS. MORRELL: Yes, your Honor.

THE COURT: Okay. You are finally excused. You may step down.

Call your next witness.

MR. HINKEBEIN: Re-call Galin Frye.

THE COURT: Please come forward and retake the witness stand. You'll recall that you're still under oath.

(The witness complied.)

THE COURT: You may proceed, Mr. Hinkebein.

MR. HINKEBEIN: Just briefly.

* * *

GALIN EDWARD FRYE
being previously sworn, testified further as follows:

* * *

DIRECT EXAMINATION
BY MR. HINKEBEIN:

Q. During the period of, say, November 1 to December -- January 4 -- November 1, 2007, to January 4, 2007, did you have the same phone number?

A. Yes.

Q. Okay. And did you receive any letters from the Public Defender's Office, Mr. Coles, or anyone else regarding this offer?

A. No.

Q. Did you pick up another case?

A. I believe it was in St. Charles.

Q. Okay. What case was that? What kind of case?

A. Driving while revoked.

Q. Okay. And when was that? Do you remember?

A. I don't remember. December 30th, I believe.

Q. So it was after the expiration of the offer?
A. Yes.

MR. HINKEBEIN: No further questions.

MS. MORRELL: Nothing further, your Honor.

THE COURT: Cross-examination.

MS. MORRELL: No.

THE COURT: Okay. You may step down.
Further evidence by the movant.

MR. HINKEBEIN: None, your Honor.

* * *

MOVANT RESTS

* * *

MR. HINKEBEIN: At this time, I would ask to submit what has been marked Movant's Exhibit Number 1, which is the letter.

MS. MORRELL: No objection.

THE COURT: One will be admitted.

(MOVANT'S EXHIBIT 1 WAS ADMITTED INTO EVIDENCE.)

* * *

MR. HINKEBEIN: And Movant's Exhibit Number 2, which is the memo of case activity identified by Mr. Coles.

THE COURT: Any objection to 2?

MS. MORRELL: No, your Honor.

THE COURT: Two will be admitted.

(MOVANT'S EXHIBIT 2 WAS ADMITTED INTO EVIDENCE.)

* * *

THE COURT: Any further evidence by the movant?

MR. HINKEBEIN: None.

THE COURT: Evidence by the respondent.

MS. MORRELL: None, your Honor.

THE COURT: Movant appears in person and by Counsel Karl Hinkebein. Respondent appears by Counsel Stephanie Morrell.

Parties announce ready. Movant adduces evidence and rests. Respondent offers no evidence. Evidence closed.

Parties to submit proposed findings of fact and conclusions of law within 30 days. Cause passed to 10:30 a.m., November 3, 2008, Division I, for submission only.

Okay. Anything else?

MR. HINKEBEIN: No, your Honor. I'm just going to retain the exhibits and I'll attach them to the findings that I file.

THE COURT: That will be fine.

MR. HINKEBEIN: I'll attach copies.

THE COURT: Court will be in recess.

(The hearing adjourned at 9:32 a.m.)

* * *

Office of the Boone County Prosecuting Attorney

[State Seal]

DANIEL K. KNIGHT, Prosecutor

705 E. Walnut Street–Courthouse 573-886-4100
Columbia, Missouri 65201-4485 FAX: 573-886-4148

November 15, 2007

[Exhibit Sticker: "Movant's No 1 09/03/08"]

[initialed: "MC"]

Michael Coles
Attorney at Law
601 East Walnut
Columbia, MO 65201

RE: State of Missouri v. **GALIN EDWARD FRYE**
Case Number: **07BA-CR03869**

Dear Michael:

My recommendation is a follows (3) and defer, on the felony with 10 days "shock" in the Boone County Jail; **OR** (90) days to serve on an amended misdemeanor in the Boone County Jail.

I am going to subpoena witnesses for the preliminary hearing on January 4, 2008. I will need to know if Mr. Frye will be waiving to preserve the offer by noon on December 28, 2007.

If you have any questions, please contact me.

Sincerely,

/s/ Brent Nelson
Brent Nelson
Assistant Prosecuting Attorney

ls

Division 9 In Custody Y (N)

MEMO OF CASE ACTIVITY

Name: Frye, Galin Case Number: _____
Date: 1/4/08 Attorney: MC
_ ***Court Appearance*** Time: 2:30 For: PH
_ ***Client Conference*** In person ___ Where: ____
Phone ____
_ ***Communication with Prosecutor***

- Probably should

- Talk to him, from St. Louis, rec is tagged

- Also has new misd. (go ahead & enter)

WAIVE

[Exhibit sticker:
Movant's No. 2
10/03/08]

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

GALIN E. FRYE, Movant,	)
vs.	)CASE NO. 08BA-CV03050
STATE OF MISSOURI, Respondent.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Now on this 18th day of November, 2008, the court enters the following findings of fact and conclusions of law as required by Rule 24.035(j):

On March 3, 2008, Movant pled guilty to one count of felony of driving while revoked pursuant to a plea agreement where the State recommended three years in the Department of Corrections and deferred to the court as to probation. On May 5, 2008, Movant was sentenced to three years in the Department of Corrections.

Movant timely filed his *pro se* motion for post-conviction relief and following appointment of counsel, Movant filed his amended motion on September 5, 2008.

On October 3, 2008, an evidentiary hearing was held where Movant and his counsel testified.

Claim 8a) Movant's only claim is that his counsel was ineffective for failing to inform him that the State had made an offer for him to plead to a misdemeanor driving while revoked with a 90 day jail sentence. Movant claims that had he known the

State had made that offer, he would have accepted that plea offer. Movant does not claim that he would have gone to trial but for his counsel's actions.

Movant testified at the evidentiary hearing that he was unaware that the State had made a misdemeanor plea offer. Movant testified that had he known about the plea offer, he would have accepted that offer.

Movant's trial counsel testified that he could not recall whether he had informed Movant about the misdemeanor plea offer but that he did recall that Movant was extremely difficult to get in touch with and that he had changed his telephone number multiple times. Counsel also testified that the misdemeanor offer expired on December 28, 2008 and that counsel was aware that the prosecutor, Brent Nelson, did not normally extend his offers past the revocation date. Counsel testified the misdemeanor offer had expired and was revoked before he saw Movant in court. Thus, there was no misdemeanor offer to accept. This Court finds counsel's testimony credible. Even assuming that counsel failed to tell Movant of the offer, counsel cannot be faulted for failing to inform Movant of an offer when Movant fails to stay in touch with counsel.

In any event, Movant's claim cannot succeed. Even assuming that counsel can be faulted for failing to tell Movant about this plea offer, Movant would not be entitled to a remand because claims under Rule 24.035 must include a claim that Movant would have gone to trial but for his counsel's errors. This Court agrees with the Southern District Court of Appeals analysis in Beach v. State, 220 S.W.3d 360 (Mo.App. S.D. 2006):

In the present case, Movant's only allegation of prejudice is that, but for plea counsel's alleged misadvice with regard to his chances for probation, he would not have rejected the fifteen-year plea offer previously extended by the State. Based upon this fact, and applying the above legal principles, we conclude the following. Movant's constitutional right to effective assistance of counsel is premised upon and exists to provide protection of Movant's constitutionally guaranteed fundamental right to a fair trial. However, Movant's plea of guilty waived his right to a trial, so no trial was held. Thus, the only way to properly evaluate the alleged ineffectiveness of Movant's plea counsel is by what effect, if any, counsel's alleged error had upon Movant's waiver of his right to a fair trial, i.e., is his waiver of trial by guilty plea knowing and voluntary. So, if there is a reasonable probability that, but for plea counsel's alleged error, Movant would not have pleaded guilty thereby waiving his right to a trial, but would have insisted upon going to trial, then Movant's constitutionally guaranteed fundamental right to a fair trial has been denied, and Movant is constitutionally prejudiced by the alleged ineffective assistance of his counsel. If, however, despite the alleged error by counsel, Movant asserts, as he has in his Rule 24.035 motion, that he would have persisted in waiving his constitutional right to a fair trial by pleading guilty, then Movant has not been denied his right to a fair trial and is not constitutionally prejudiced by counsel's alleged ineffectiveness. Based upon the allegations contained in Movant's motion, we

conclude that Movant's conviction is not the result of a violation of Movant's constitutional right to effective assistance of counsel and, as such, is not cognizable under Rule 24.035. A contrary conclusion raises two problems. To conclude otherwise challenges the finality in all criminal convictions entered as a result of a guilty plea--a concern directly addressed by the United States Supreme Court in *Hill, supra*. Virtually every criminal case resolved by a guilty plea involves plea negotiations and, in those few that do not, an argument could be made that plea counsel was ineffective for not engaging in plea negotiations. Therefore, if any perceived prejudice to a movant in such plea negotiations rises to the level of constitutional prejudice to support an ineffective assistance of counsel claim, every guilty plea would require an evidentiary hearing on the ensuing Rule 24.035 motion. The *Hill* court resolved this potential finality question by premising a Movant's constitutional prejudice upon whether, but for plea counsel's alleged error, the Movant would have pleaded not guilty and insisted upon a trial. Aside from the finality issue, a contrary conclusion presents a practical problem as well: What is Movant's remedy? If, upon remand and an evidentiary hearing, the motion court finds that the Movant's alleged facts are true, then the motion court would be required to vacate and set aside the judgment and set the case for either resentencing or trial. See Rule 24.035(j). Yet, setting the case for resentencing would not be an effective remedy because the motion court has no power to require the State to reinstate the alleged

> favorable plea offer. The State could simply refuse to offer Movant any plea agreement. In the absence of the alleged favorable plea offer or any other plea offer, setting the case for trial would not be an appropriate remedy because, based upon the record before the motion court, Movant has already made the decision to plead guilty based on the terms of the alleged less-favorable plea agreement rather than insist on a trial.

[citations omitted].

Here, Movant does not claim he would have gone to trial. He only claims that he would have accepted the misdemeanor offer that no longer existed. Movant is not even entitled to a plea agreement or plea offer. State v. Honorable Cynthia Eckelkamp, 133 S.W.3d 72 (Mo.App. E.D. 2004).

Nor is Movant entitled to a remand. Movant would not be able to take advantage of the plea offer as it has been withdrawn by the State, the State would not be required to renew that offer. Even if the State was required to renew the offer, it would have the option of withdrawing it before it was accepted by the trial court. See Griffith v. State, 845 S.W.2d 684, 686-687 (Mo.App. S.D. 1993); Stokes v. State, 688 S.W.2d 19, 22 (Mo.App. E.D. 1985). See Bryan v. State, 134 S.W.3d 795, 804 (Mo.App. S.D. 2004) (for similar facts; "A second difficulty is that Bryan contends he was denied the opportunity to plead guilty on terms he now finds acceptable. Remanding the case would be an ineffective remedy since we have no power to require the State to reinstate any of the various plea offers which Bryan previously turned down. [citations omitted]. Assuming we reversed the trial court's decision and remanded the

case, the State could simply refuse to offer Bryan any plea agreement"); see also Rowland v. State, 129 S.W.3d 507 (Mo.App. S.D. 2004). Because Movant has failed to claim, either at the evidentiary hearing or in his motion, that he would have gone to trial but for his trial counsel's actions and because a remand would be improper, this Court finds that Movant is entitled to no relief.

Movant's claim is denied.

SUMMARY

It is the conclusion of this Court that Movant has failed to show that his conviction or sentence violates the Constitution or laws of this State or of the United States.

WHEREFORE, it is the judgment of this Court that all of the Movant's claims are denied. Costs taxed against Boone County, Missouri.

SO ORDERED, this 18th day of November, 2008.

/s/ Gene Hamilton
Gene Hamilton
Circuit Judge, Division I

In the
Missouri Court of Appeals
Western District

GALIN E. FRYE,	)	
	)	
Appellant,	)	**WD70504**
	)	
v.	)	**OPINION FILED:**
	)	**March 23, 2010**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of
Boone County, Missouri
The Honorable Clifford E. Hamilton, Jr., Judge

Before Division Four: THOMAS H. NEWTON, Chief Judge, JOSEPH M. ELLIS, Judge and CYNTHIA L. MARTIN, Judge.

Galin Frye appeals the motion court's denial of his Rule 24.035 motion for post-conviction relief following an evidentiary hearing. Frye contends that the motion court clearly erred in denying his motion because he received ineffective assistance of counsel as a result of trial counsel's failure to inform him of a plea offer made by the State. The plea offer would have permitted Frye to plead to the amended charge of misdemeanor driving while revoked instead of going to trial on the charge of felony driving while revoked. Frye claims he would have taken the plea offer amending his charge to a misdemeanor had he known about the offer. Frye thus contends that his subsequent entry of an "open" guilty plea to the

felony charge of driving while revoked was unknowing, involuntary, and unintelligent. We reverse and remand.

Factual and Procedural History

On August 14, 2007, the State charged Galin Frye ("Frye") with one count of the class D felony driving while his driving privilege was revoked in violation of Section 302.321.[1] Frye had previously been convicted of three misdemeanor driving while revoked charges on May 21, 2004, April 20, 2006, and February 10, 2006.

Frye's preliminary hearing was scheduled for November 9, 2007. Frye contacted counsel the day before to inform him that he could not attend the hearing. Trial counsel appeared on Frye's behalf and received a continuance of the preliminary hearing to January 4, 2008. Frye had no scheduled court appearances between November 9, 2007, and January 4, 2008.

On November 15, 2007, the State sent Frye's trial counsel a written plea offer ("Offer"). The Offer was file stamped as received in trial counsel's office on November 19, 2007. The Offer stated:

> My recommendation is a[sic] follows: 3 and defer, on the felony with 10 days "shock" in the Boone County Jail; **OR** 90 days to serve on an amended misdemeanor in the Boone County Jail.
>
> I am going to subpoena witnesses for the preliminary hearing on January 4, 2008. I will need to know if Mr. Frye

[1] All statutory references are to RSMo 2000 as supplemented unless otherwise indicated.

> will be waiving [sic] to preserve the offer by noon on December 28, 2007.

Trial counsel's highlighting of, and other pen marks on, the written Offer, coupled with trial counsel's testimony at the post-conviction hearing, confirm that trial counsel actually received and read the Offer approximately one week after it was mailed.

Frye testified at the post-conviction hearing that he had no knowledge of the Offer until after he was convicted, sentenced, and incarcerated.[2] At the time of the Offer, Frye lived in St. Louis, Missouri. Trial counsel had Frye's mailing address. Frye testified at the post-conviction hearing that during the Offer window he did not see or speak with trial counsel and that his mailing address did not change.

Trial counsel testified at the post-conviction hearing that trial counsel could not recall whether he had communicated the Offer to Frye. Trial counsel testified that there was no correspondence in his file to indicate any effort was made by his office to mail the Offer to Frye. Trial counsel could not recall speaking with, seeing, or ever attempting to contact Frye during the Offer window of November 15, 2007, to December 28, 2007.

On January 4, 2008, Frye appeared for his continued preliminary hearing. Trial counsel, who was unable to attend, placed a note in Frye's file for the docket attorney covering the hearing. The note stated "-Probably should-Talk to him, from St. Louis, rec is tagged-Also has new misd, (go ahead & enter) WAIVE." Trial counsel interpreted his note during

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[2] Frye testified at the post-conviction hearing that his post-conviction counsel sent him a copy of the Offer while he was incarcerated.

the post-conviction hearing. He testified that his note indicated that the Offer was included in the file and should be discussed with Frye. By this time, however, the Offer had expired. Frye testified that the docket attorney did not advise him of the expired Offer at the time of the preliminary hearing. Trial counsel interpreted his note's reference to "new misd" as referring to the fact that Frye had received another charge. Frye testified during his post-conviction hearing that he received another misdemeanor driving while revoked charge on December 30, 2007.[3] This was two days after the Offer expired. It is unclear how trial counsel knew of Frye's new charge, though we surmise Frye must have had a discussion of some sort with his counsel between December 30, 2007, the date of the new charge, and January 4, 2008, the date of the preliminary hearing for which trial counsel had prepared the hand written instructions for the docket attorney.

On March 3, 2008, Frye entered an "open" guilty plea to the class D felony of driving while revoked. The new charge Frye received on December 30, 2007, was not addressed during the guilty plea hearing. The State recommended a three year sentence, deferred, with ten days shock time. This was identical to the first of the two options that had been described in the Offer. The sentencing court did not accept the State's recommendation. Frye was sentenced on May 5, 2008 to three years imprisonment in the Missouri Department of Corrections.

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[3] The record does not reflect where the new charge was received.

On June 9, 2008, Frye filed a *pro se* motion seeking post-conviction relief pursuant to Rule 25.035 ("Motion"). Frye's Motion alleged that trial counsel was ineffective for failing to communicate the Offer. Following an evidentiary hearing, the motion court denied Frye's Motion. This appeal follows.

Standard of Review

Appellate review of the disposition of a motion filed under Rule 24.035 is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. Rule 24.035(k); *Krider v. State*, 44 S.W.3d 850, 856 (Mo.App. W.D. 2001). The trial court's "findings and conclusions are clearly erroneous only if, after reviewing the entire record," we are left with a "definite and firm impression that a mistake has been made." *Id.*

Analysis

In Frye's sole point on appeal, he contends that the motion court clearly erred in denying his Motion following an evidentiary hearing because his guilty plea was unknowing, involuntary, and unintelligent. Frye contends that trial counsel failed to inform him of the Offer. Frye contends that had he known of the Offer he would have accepted the prong of the Offer which would have permitted him to plead to an amended misdemeanor charge of driving while revoked, and that he would not have entered an "open" guilty plea to the class D felony charge of driving while revoked.

A guilty plea must be a "voluntary expression of the defendant's choice, and a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences." *State v.*

Roll, 942 S.W.2d 370, 375 (Mo. banc 1997). Once a guilty plea is entered, all claims that counsel was ineffective are waived, "except to the extent that the conduct affected the voluntariness and knowledge with which the plea was made." *Worthington v. State*, 166 S.W.3d 566, 573 (Mo. banc 2005).

The plea process in a criminal adjudication warrants the same constitutional guarantee of effective assistance of counsel as trial proceedings. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). To prevail on an ineffective assistance of counsel claim following a guilty plea, Frye must show by a preponderance of the evidence that: (1) trial counsel's performance was deficient because he failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise in similar circumstances; and (2) the deficient performance prejudiced Frye. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Simmons*, 955 S.W.2d 729, 746 (Mo. banc 1997). If either the performance prong or the prejudice prong is not met, then we need not consider the other, and Frye's claim of ineffective assistance of counsel must fail. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

Performance Prong

To satisfy the performance prong, Frye must show by a preponderance of the evidence that trial counsel's failure to inform him of the Offer fell below an objective standard of reasonableness. Reasonableness is looked at in light of all of the circumstances, and the prevailing professional norms at the time of the alleged error. *Strickland*, 466 U.S. at 688-89, 104 S.Ct. 2052. Frye must overcome the presumption that any challenged action was sound trial strategy,

and that counsel rendered adequate assistance of counsel, making all significant decisions in the exercise of professional judgment. *Id.* at 689-90, 104 S.Ct. 2052.

"Failure of defense counsel to communicate a plea offer ordinarily constitutes deficient performance" of counsel. *Members v. State*, 204 S.W.3d 210, 212 (Mo.App. W.D. 2006) (citing *State v. Colbert*, 949 S.W.2d 932, 946 (Mo.App. W.D. 1997)). In *Members*, defendant contended his guilty plea was involuntary and that he received ineffective assistance of counsel because counsel had not communicated a plea offer. *Id.* at 211. The motion court did not permit the defendant an evidentiary hearing. *Id.* We concluded that the failure to communicate a plea offer satisfies the performance prong of *Strickland*. *Id.* at 213. Because the motion court had not permitted the defendant an evidentiary hearing to determine whether, in fact, the offer had not been communicated, we reversed and remanded the case for an evidentiary hearing. *Id.* In *Colbert*, defendant claimed he was not advised of the State's plea offer for twenty-five years imprisonment on Count I and five years imprisonment on Counts II and III, for a total of thirty years imprisonment. 949 S.W.2d at 945. Defendant claimed that he was prejudiced as a result, since unaware of the offer, he elected to go to trial where he was convicted and received life imprisonment on one count and multiple year sentences on other counts to run consecutive with the life sentence. *Id.* at 938, 946. The court found defendant had sufficiently alleged ineffective assistance of counsel based on counsel's failure to communicate an offered plea and remanded the case for an evidentiary hearing. *Id.* at 946.

In *Cottle v. Florida*, 733 So.2d 963 (Fla. 1999), the court held that "[t]he caselaw uniformly holds that counsel is deficient when he or she fails to relate a plea offer to a client." *Id.* at 966 (citation omitted). Similarly, in *Turner v. Texas*, 49 S.W.3d 461 (Tex.App. 2001), the court held that defense counsel's failure to communicate a deadline attached to a plea offer constituted ineffective assistance of counsel. The court held that it was not reasonable trial strategy for trial counsel to withhold the deadline from the defendant merely because trial counsel believed the defendant would be forced to make a faster decision. *Id.* at 470. The court stated "the only reasonable strategy ... would have been to timely notify Appellant of the imminently approaching deadline." *Id.*

Here, Frye contends the Offer was not communicated to him at all. We can conceive of no reasonable trial strategy that would justify trial counsel's failure to communicate the Offer to Frye. We conclude, consistent with *Members*, that if Frye was not advised of the Offer, he has established the *Strickland* performance prong. We turn our attention, therefore, to whether Frye established that he was not told of the Offer.

In its Findings of Fact, Conclusions of Law, and Judgment, the motion court acknowledges Frye's testimony that he was not advised of the Offer until after he was incarcerated. The motion court did not indicate whether it found Frye's testimony to be believable. The motion court acknowledged trial counsel's testimony that he could not recall whether he had informed Frye about the Offer. The trial court found trial counsel's testimony to be credible. The effect was a finding that trial counsel credibly reported no recollection of informing Frye of the

Offer. The motion court did not make an express finding with respect to whether Frye knew of the Offer. However, the motion court found that "even assuming that counsel failed to tell Movant of the offer, counsel cannot be faulted for failing to inform Movant of an offer when Movant fails to stay in touch with counsel."

The motion court was required to "issue findings of fact and conclusions of law on **all** issues presented." Rule 24.035(j) (emphasis added). While " '[t]here is no precise formula to which findings of fact and conclusions of law must conform,' they must address all of the issues raised and be sufficiently specific to allow for meaningful appellate review." *Grimes v. State*, 260 S.W.3d 374, 375 (Mo.App. W.D. 2008) (quoting *Ivory v. State*, 211 S.W.3d 185, 189 (Mo.App. W.D. 2007)). We are typically required to remand a case back to the court for requisite findings of fact that have not been made. *Id.* We do not believe the absence of an express finding of fact as to Frye's knowledge of the Offer requires remand, however. The motion court found trial counsel's testimony credible. Trial counsel's testimony included not only his concession of no memory one way or the other of having informed Frye of the Offer but also a general discussion of difficulties trial counsel had communicating with Frye. By finding that "even if" Frye did not know of the Offer it was Frye's fault, the motion court can be reasonably assumed to have made the implicit finding that Frye did not know of the Offer and that he was to blame for his lack of knowledge. We believe, therefore, that the motion court's findings of fact are "sufficiently specific to allow for meaningful appellate review." *Id.* We agree with the trial court's implicit finding that Frye was not informed of the Offer. We do not agree,

however, that the record supported a finding that Frye was to blame for trial counsel's failure to communicate the Offer.

At the post-conviction hearing, trial counsel testified:

> Counsel, we've talked about this on the phone. I have wracked my brain to try to remember what happened in Mr. Frye's case. I can tell you that I do remember that communication -- I'm not suggesting through faults of his own, but he lived in St. Louis, and communication -- I believe I had different phone numbers from time to time. **I'm not sure if I communicated this to him or not**, simply because I don't remember him being in court with me as often as most of my other clients; that he was from St. Louis, and that I think that he missed court a few times. And I don't believe I saw him again until after this offer would have been revoked by operation of the language of it, of the letter.

(Emphasis added.) Although trial counsel testified that Frye "missed court a few times," the only missed court appearances reflected in the record were between January 4, 2008, and March 3, 2008, after the Offer expired. During the Offer window, Frye never failed to appear in court because there were no scheduled court appearances during that time. Though trial counsel stated that Frye had different phone numbers from time to time, the only specific evidence relating to how this impacted trial counsel's

communication with Frye was trial counsel's testimony that: "Oh, I called him on the 28th and noted in my file that his phone was not in service," referring to January 28, 2008. Trial counsel also testified that on February 4, 2008, Frye gave him an updated number, suggesting Frye initiated contact with him to provide this information. Trial counsel never testified that he made any unsuccessful effort to contact Frye by phone during the Offer window. Instead, trial counsel conceded: "I'm not sure if I communicated this [the Offer] to him or not."

The record also indicates that there was no communication by mail between trial counsel and Frye during the Offer window. Frye's client file is void of correspondence to Frye communicating the Offer. Trial counsel testified that the absence of a letter in Frye's file reflecting transmittal of the Offer would tend to indicate that no effort was made to communicate the Offer to Frye in writing.

Pursuant to the Rules of Professional Conduct that govern the Missouri Bar, Frye's trial counsel had an absolute duty to keep Frye informed of plea communications. Rule 4-1.4 states: "(a) A lawyer shall: (1) keep the client reasonably informed about the status of the matter; [and] ... (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation." *See also In re Crews*, 159 S.W.3d 355, 359 (Mo. banc 2005). Pursuant to Rule 4-1.4 comments one and two, counsel is required to keep the client informed of significant developments in the case, and "a lawyer who receives from opposing counsel ... a proffered plea bargain in a criminal case ***must promptly inform the client of its substance.***" (Emphasis added).

The motion court correctly noted that "[t]he reasonableness of counsel's actions [to determine if the performance prong was met] may be determined or substantially influenced by the defendant's own statement or actions." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. However, counsel's failure to act is only justifiable in circumstances where, because of the defendant's own conduct, counsel was unable to properly carry out his responsibilities. *State v. Johnson*, 901 S.W.2d 60, 63 (Mo. banc 1995) (finding that trial counsel was not ineffective for failing to call a witness because the defendant failed to inform him of the witness's existence until after trial). It is only when a defendant's behavior leads to a fundamental lack of information on the part of counsel that counsel is excused from the reasonable standard of performance. *Id.*; *see also Cherco v. State*, 309 S.W.3d 819, 825-26 (Mo.App. W.D. 2010) (finding the performance prong of *Strickland* was not met because defendant failed to stay in touch with counsel, despite repeated attempts by counsel to contact him). In this case, trial counsel could not be excused from his absolute duty to communicate the Offer to Frye unless Frye's behavior caused trial counsel to be unable to do so. The record is void of ***any*** evidence of ***any*** effort by trial counsel to communicate the Offer to Frye during the Offer window, let alone any evidence that Frye's conduct interfered with trial counsel's ability to do so.

Reviewing the entire record, therefore, we are left with a definite and firm impression that a mistake has been made. The trial court clearly erred in blaming Frye for "failing to stay in touch" with counsel during the six week Offer window, a finding which effectively shifted to Frye the duty to "stay in

touch," and which divested trial counsel of his absolute duty to communicate the Offer to his client. As there was no evidence that any effort of any kind was made by trial counsel to timely inform Frye of the Offer, we conclude that Frye established by a preponderance of the evidence that he was not informed of the Offer while the Offer was pending or before his guilty plea. As a result, trial counsel's performance was deficient. *Members*, 204 S.W.3d at 213. The *Strickland* performance prong has been met. We now determine whether trial counsel's failure to communicate the Offer prejudiced Frye.

Prejudice Prong

In *Strickland*, the Supreme Court articulated the standard for prejudice, stating that a defendant must show a reasonable probability that, but for counsel's alleged deficiencies, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The *Strickland* prejudice prong has since been interpreted by the Court in *Hill*, in the context of guilty pleas, to mean that in order to show prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59, 106 S.Ct. 366. The State contends that because Frye did not contend that "but for" trial counsel's failure he would have insisted on going to trial, Frye cannot establish prejudice as a matter of law. We disagree.

In *Hill*, the Supreme Court extended the *Strickland* analysis to guilty plea proceedings, noting that "our justifications for imposing the 'prejudice' requirement ... are also relevant in the context of guilty pleas." *Hill*, 474 U.S. at 57, 106 S.Ct. 366

(citing *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052). These justifications were:

> The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. ***Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.***

Id. (citing *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052) (emphasis added). *Hill* thus acknowledges that the *Strickland* inquiry for "prejudice" necessarily depends on the specific evidence and circumstances surrounding the claimed error. *Id.* It follows, therefore, that the determinative factors for evaluating whether counsel's ineffectiveness is prejudicial must be based on the specific facts and circumstances of the case. Reliance on *Hill*'s "template" that a defendant must contend that "but for" counsel's ineffective assistance the defendant would have insisted on going to trial as determinative of whether

a defendant can establish prejudice completely ignores *Strickland*'s looser emphasis on whether a defendant can establish "an adverse effect on the defense." *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052. We conclude that though prejudice may, and often will, be established by a defendant's showing that "but for" counsel's ineffective assistance, the defendant would not have pled guilty and would have insisted on going to trial, this is not the only way prejudice can be established. According to *Strickland*, the test of prejudice is whether "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. *See Colbert*, 949 S.W.2d at 940 ("To demonstrate prejudice, the movant must show a reasonable probability that, but for his attorney's unprofessional errors, ***the result of the proceeding would have been different.***") (citing *State v. Harris*, 870 S.W.2d 798, 814 (Mo. banc 1994), *cert. denied*, 513 U.S. 953, 115 S.Ct. 371, 130 L.Ed.2d 323 (1994)) (emphasis added).

In a case similar to the one before us, our Supreme Court has demonstrated its agreement with this approach to establishing prejudice. In *Dobbins v. State*, 187 S.W.3d 865 (Mo. banc 2006), Dobbins, relying on the advice of counsel, rejected a ten year imprisonment plea with the State, and instead entered an "open" guilty plea. *Id.* at 866. Dobbins was subsequently sentenced to eighteen years for possession of marijuana with the intent to distribute. *Id.* Dobbins filed a Rule 24.035 motion alleging counsel affirmatively mislead him about his eligibility for early release. *Id.* The Supreme Court found that Dobbins received ineffective assistance of counsel based on counsel's affirmative misrepresen-

tation, and in discussing whether prejudice had been established, noted:

> Counsel's ineffectiveness must be joined with prejudice to afford Dobbins relief. In this case, ***Dobbins was prejudiced because he rejected an offer to plead to a charge resulting in a 10-year sentence. If he had known he was not able to challenge the sentence, he would not have entered an open plea, but would have accepted the offer***, which matched the lowest sentence he could have received under the open plea agreement. Moreover, the facts relating to Dobbins' understanding of the pleas and his agreement that no one had promised leniency for the plea are irrelevant. It was not the sentence to be imposed that concerned Dobbins-it was his eligibility for sentence reduction as to any sentence that was imposed. ***His attorney's affirmative misrepresentation as to his ability to challenge the sentence prejudiced Dobbins by causing him to plead guilty when he otherwise would not have done so.***

Id. at 867 (emphasis added). Reading the above passage as a whole, it is apparent the Supreme Court did not employ the narrow *Hill* "but for" test to find prejudice in *Dobbins*. As in *Dobbins*, Frye did not accept a plea offer that he says he would have accepted but for counsel's ineffective assistance. As in *Dobbins*, Frye does not contend in his post-conviction motion that but for counsel's ineffective

assistance, he would not have pled guilty and would have insisted on going to trial.

Here, the motion court denied Frye's post-conviction motion because "[e]ven assuming that counsel can be faulted for failing to tell Movant about this plea offer, Movant would not be entitled to a remand because claims under Rule 24.035 must include a claim that Movant would have gone to trial but for his counsel's errors." The motion court did not discuss *Dobbins*. Instead, the motion court cited *Beach v. State*, 220 S.W.3d 360 (Mo.App. S.D. 2007), which addresses *Dobbins*. The court in *Beach* read *Dobbin*'s statement that defendant was caused "to plead guilty when he otherwise would not have done so" to mean Dobbins would not have plead guilty *and would have insisted on going to trial*. *Beach*, 220 S.W.3d at 367. The Southern District stated, "this sentence clearly states that, but for ineffectiveness of plea counsel, Dobbins would not have pleaded guilty. By implication, the only alternative to not pleading guilty is to go to trial. Thus, the Court applied the *Hill* standard without citation." *Id.* at 368. We decline to so interpret *Dobbins*. The Southern District's reading of a single sentence in *Dobbins* out of context ignores the balance of the Supreme Court's discussion which included the statement that had the defendant "known he was not able to challenge the sentence, ***he would not have entered an open plea, but would have accepted the offer.***" *Dobbins*, 187 S.W.3d at 867 (emphasis added). *Beach*'s interpretation of *Dobbins* and its application of *Hill* would leave a defendant with no recourse even if the defendant has clearly established that "but for" his counsel's ineffective assistance the outcome of his proceeding would have been different. Our court does not construe *Hill* to bar other means

of establishing prejudice when insisting on going to trial cannot possibly remediate ineffective assistance that has affected the outcome of the proceeding. *Cherco*, 309 S.W.3d at 829-30 (finding ineffective assistance of counsel during the sentencing phase may warrant remand for resentencing without an allegation by the defendant that he would not have pled guilty and would have insisted on going to trial); *see also Members*, 204 S.W.3d at 213 (finding that a defendant has been prejudiced if the defendant proves that counsel failed to communicate a plea offer that the defendant would have accepted).

Other jurisdictions have found prejudice when counsel fails to inform a defendant of a plea offer, notwithstanding defendant's failure to contend he would have insisted on going to trial. In *Turner*, the court found "the record shows that Appellant was prejudiced by defense counsel's ineffectiveness and that, but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different." 49 S.W.3d at 470. The court went on to conclude that when a defendant was not informed of a deadline placed on a plea offer, and when "the record shows that Appellant would have timely accepted the offer had the deadline been properly conveyed to him, Appellant has satisfied the burden of showing prejudice." *Id.* In *Cottle*, defendant claimed he received ineffective assistance of counsel because his counsel failed to convey the State's plea offer. 733 So.2d at 964-65. The court held that "an inherent prejudice results from a defendant's inability, due to counsel's neglect, to make an informed decision whether to plea bargain, which exists independently of the objective viability of the actual offer." *Id.* at 969 (citations omitted).

In light of the foregoing, we find the motion court's conclusion that Frye was not prejudiced by trial counsel's failure to communicate the Offer merely because Frye did not contend that he would have insisted on going to trial to be a clearly erroneous finding of fact based on a clearly erroneous declaration of the law.

The motion court also concluded that remand of Frye's case would not be proper because now that the Offer has expired, the State cannot be compelled to renew the Offer. Moreover, according to the motion court, the State would have the power to withdraw the Offer, even if renewed, at any time before sentencing.

"While a defendant has no constitutional right to a plea bargain, *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977), during negotiations he is entitled to presuppose fairness in the agreement." *State v. Price*, 787 S.W.2d 296, 299 (Mo.App. W.D. 1990) (citing *Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)). This fairness guarantee was restricted in *Mabry v. Johnson*, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984). A "plea agreement standing alone is without constitutional significance." *Id.* at 507. Thus, "[u]nless a plea agreement impaired the voluntariness or intelligence of a guilty plea, the defendant has no constitutional right to have the plea specifically enforced." *Price*, 787 S.W.2d at 299 (citing *Mabry*, 467 U.S. at 510, 104 S.Ct. 2543). The Court in *Mabry*, in discussing a plea offer, "found that the question of whether a prosecutor was negligent or otherwise culpable in first making and then withdrawing an offer was not relevant to a due process argument." *Price*, 787 S.W.2d at 299-300

(citing *Mabry*, 467 U.S. at 511, 104 S.Ct. 2543). Thus, it does in fact appear that a plea offer can be withdrawn at any time before it is accepted by the court, and a plea offer once accepted by the defendant can be withdrawn without recourse,[4] unless, as noted in *Mabry*, the plea agreement impaired the voluntariness of the guilty plea.

However, we are not dealing with a case of claimed prosecutorial misconduct. *Price*, *Mabry*, and the other cases cited by the motion court in its Judgment relating to the enforceability of a plea offer or agreement all arose in the context of a defendant's claim of prosecutorial misconduct in withdrawing or failing to honor a plea. Here, the claimed constitutional violation relates to Frye's entitlement to effective assistance of counsel. The motion court suggests that unless there is a suitable means of remediating the demonstrated ineffective assistance of counsel, there can be no prejudice. In other words, the motion court suggests that because we cannot compel the State to renew the Offer, Frye is not prejudiced because we cannot, by remanding this case, restore Frye to the position he would have been in but for the ineffective assistance.

We do not believe the determination of prejudice can be bootstrapped in this fashion. The State had exclusive control over the charging of Frye's offense. Thus, had Frye been advised of the Offer, and had he accepted the Offer, the trial court would have been bound to accept the guilty plea for the misdemeanor

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[4] For example, the State may well have withdrawn the Offer, even if accepted by Frye, if it became aware prior to sentencing of Frye's new charge on December 30, 2007.

charge.[5] The maximum jail sentence that the trial judge could have imposed for the misdemeanor plea was one year imprisonment. Section 558.011. The maximum sentence for the class D felony to which Frye entered an "open" guilty plea was four years. *Id.* Frye received three years. Because of trial counsel's failure to inform Frye of the Offer, Frye pled guilty to a felony instead of a misdemeanor and was subject to a maximum sentence of four years instead of one year. We conclude that notwithstanding the practical difficulties associated with Frye's recourse, Frye has nonetheless established prejudice pursuant to *Strickland*. We are left with a definite and firm impression that a mistake was made. We find that Frye did sufficiently prove, by a preponderance of the evidence, that he was prejudiced through trial counsel's failure to convey the State's Offer.[6]

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[5] Of course, the trial court would have been free to sentence Frye along the continuum of the range of punishment applicable to the misdemeanor, just as it was free to sentence Frye along the continuum of the range of punishment for the felony to which Frye entered his "open" plea. Had the Offer only addressed a non-binding sentencing recommendation in exchange for a plea of guilty on the original felony charge of driving while revoked, Frye would be hard pressed to establish prejudice, notwithstanding counsel's failure to communicate the Offer, as the State's Offer would not have been binding, in any manner, on the trial court.

[6] We are aware that Frye's new misdemeanor charge apparently influenced trial counsel's decision not to request an extension of the Offer from the State. That new charge was obtained by Frye after the Offer window expired. Trial counsel's belief about whether he could have persuaded the State to renew the Offer is irrelevant as Frye does not contend ineffective assistance of counsel on this basis. It is sufficient for Frye's showing of prejudice that the Offer window would have permitted Frye to accept the Offer and to have submitted to a guilty plea hearing on the amended charge in advance of receiving yet another charge for driving while revoked.

We are left then with discerning the appropriate recourse for Frye's established Rule 24.035 violation. Rule 24.035(j) provides that if a basis for Rule 24.035 relief is determined to exist, "the court shall vacate and set aside the judgment and shall discharge the movant or resentence the movant or order a new trial or correct the judgment and sentence ***as appropriate.***" (Emphasis added.) Though in this case, the ***"appropriate"*** remediation might be to afford Frye the opportunity to plead guilty to the amended charge of misdemeanor driving while revoked, we appreciate that we are not empowered to order the State to reduce the charge against Frye. A remand, therefore, may leave Frye with but two options -- proceed to trial or plead guilty to and be resentenced for the same felony driving while revoked charge to which Frye originally entered his "open" guilty plea. Though this is [sic] may not seem a satisfactory remedy for Frye, our alternative is to ignore the merits of Frye's claim, which we are unwilling to do.

Our Supreme Court faced the same constraint we face today in *Dobbins*. Upon finding prejudice arising out of a similar scenario where a defendant claimed ineffective assistance of counsel prejudiced him from accepting an earlier plea offer, the Court reversed the judgment and remanded the case. *Dobbins*, 187 S.W.3d at 867. We will do the same, deferring to Frye whether he desires to insist on a trial or to plead guilty to the charged offense or to such other amended charge as the State may deem it appropriate to offer.[7] In either case, we will be

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[7] In *Turner*, the Texas Court of Appeals remediated a similar set of circumstances by reversing the trial court's

affording Frye that to which he is entitled -- the effective assistance of counsel. We are cognizant that the State did absolutely nothing wrong in this case and is not responsible for Frye's trial counsel's failure to communicate the Offer.

Conclusion

We reverse the judgment entered on the guilty plea and deem the guilty plea withdrawn. We remand this case for further proceedings.

Cynthia L. Martin, Judge

All Concur.

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judgment and remanded the case "with orders to withdraw the appellant's plea, require the State to reinstate the plea offer as it existed prior to the Sixth Amendment violation, and allow the appellant to replead to the indictment." 49 S.W.3d at 471. We do not share the Texas court's belief that we are empowered to mandate the State to offer pleas or to amend charges, notwithstanding our finding that Frye's Sixth Amendment rights have been violated.

PETITIONER'S BRIEF

APR 15 2011

No. 10-444

IN THE

Supreme Court of the United States

MISSOURI,
Petitioner,

v.

GALIN EDWARD FRYE,
Respondent.

ON WRIT OF CERTIORARI TO THE
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Contrary to the holding in *Hill v. Lockhart*, 474 U.S. 52 (1985)—which held that to prove prejudice a defendant must allege that, but for counsel's error, the defendant would not have pleaded guilty and would have gone to trial—can a defendant who validly pleads guilty successfully assert a claim of ineffective assistance of counsel by alleging that, but for counsel's error in failing to communicate a plea offer, he would not have pleaded guilty when he did, but would have pleaded guilty sooner with more favorable terms?

2. What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

PARTIES TO THE PROCEEDING

Petitioner, State of Missouri, was the respondent below; the respondent, Galin Edward Frye, was the appellant.

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The Missouri Supreme Court's June 29, 2010, Order denying petitioner's application for transfer is included in the Appendix to the Petition at A1.

The Missouri Court of Appeals' April 27, 2010, Order denying rehearing or transfer is included in the Appendix to the Petition at A2.

The Missouri Court of Appeals' opinion, entered on March 23, 2010, is reported at *Frye v. State*, 311 S.W.3d 350 (Mo. Ct. App. 2010), and is reprinted in the Joint Appendix ("J.A.") at pp. 58-80.

The post-conviction motion court's judgment, entered November 18, 2008, is included in the Joint Appendix at pp. 52-57.

JURISDICTION

The Supreme Court of Missouri denied transfer on June 29, 2010. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Constitution of the United States, Amendment XIV:

> ... No state shall . . . deprive any person of life, liberty or property without due process of law . . . .

STATEMENT OF THE CASE

On August 14, 2007, the State filed a complaint charging Mr. Frye with driving while his license was revoked, in violation of § 302.321, Mo. Rev. Stat. 2000. J.A. 1, 11-12. Because Mr. Frye had three prior convictions for driving while revoked, his offense was elevated to a class D felony. J.A. 11-12.

The court set the case for preliminary hearing on November 9, 2007, but the court granted Mr. Frye's request for a continuance and reset the hearing for January 4, 2008. J.A. 2. Shortly thereafter, on November 15, 2007, the prosecutor sent a letter to Mr. Frye's attorney, extending a plea offer. J.A. 50. The offer outlined two options. J.A. 50. The first option stated that the prosecutor would recommend a three-year sentence and defer to the trial court on the question of probation, with the condition that Mr. Frye serve 10 days "shock" incarceration in the county jail. J.A. 50. The second option stated that the prosecutor would amend the charge to a misdemeanor, and that Mr. Frye would serve 90 days in the county jail. J.A. 50.

The prosecutor's letter stated that Mr. Frye had to accept the offer "by noon on December 28, 2007." J.A. 50. (The prosecutor intended to subpoena witnesses for the preliminary hearing on January 4, 2008. J.A. 50.) After receiving the letter, Mr. Frye's attorney did not communicate the State's offer to Mr. Frye. J.A. 33-34, 40-41, 47.[1]

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[1] Counsel testified at the post-conviction hearing that he was "not sure" if he told Mr. Frye about the offer. J.A. 41. He testified that he did not think he saw Mr. Frye until after the offer expired. J.A. 41. The contents of counsel's trial file tended to confirm that counsel had no contact with Mr. Frye after receiving the offer and before the offer's expiration. J.A. 41-45.

Before the preliminary hearing, around December 30, 2007, Mr. Frye was charged in another county with misdemeanor driving while revoked. J.A. 43, 45-47. The prosecutor handling Mr. Frye's case had a practice of terminating any plea offers "if a new case was charged." J.A. 45.[2]

On January 4, 2008, Mr. Frye waived preliminary hearing, and the case was bound over for trial. J.A. 2. On January 7, 2008, the State filed an information charging Mr. Frye with the class D felony of driving while revoked. J.A. 3.

On February 25, 2008, Mr. Frye appeared for arraignment and entered a plea of not guilty. J.A. 5. But less than a week later, on March 3, 2008, Mr. Frye withdrew his previous plea and pleaded guilty. J.A. 5-6. Mr. Frye entered an "open" plea, meaning that he had no plea agreement with the State, and that the judge could impose any sentence within the authorized range of punishment. J.A. 13, 15-16.

At the guilty-plea hearing, Mr. Frye stated that he understood various trial rights that he was giving up by pleading guilty. J.A. 14-15. After assuring the court that he understood the consequences of his plea, Mr. Frye testified that he had decided to plead guilty understanding that the court would be able to impose the full range of punishment. J.A. 16. Mr. Frye stated that he understood that he could be sentenced "up to four years," and that the court could "require [him to] do the time" J.A. 16. Mr. Frye also

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[2] According to on-line records, the new charge was also enhanced to a class D felony, and, on January 9, 2009, Mr. Frye pleaded guilty to that offense. The court in that case sentenced Mr. Frye to three years to be served concurrently with the sentence ordered in this case. *See State v. Galin Edward Frye*, No. 0811-CR02644-01.

stated that he understood that, if he received probation, he would have to spend two days in the county jail. J.A. 16-17. Mr. Frye also assured the court that no promises or threats had been made to induce his plea. J.A 17. Mr. Frye then admitted his guilt of the charged offense and that he had been convicted of driving while revoked on three prior occasions. J.A. 18-19. The court ordered a sentencing assessment report (SAR). J.A. 20-21.

At sentencing, on May 5, 2008, the prosecutor recommended a three-year sentence, deferring to the court on probation, but requesting ten days of "shock" incarceration if the court were to grant probation. J.A. 21-22. Mr. Frye's counsel requested that the court order ten days of "shock" incarceration in the county jail and place Mr. Frye on probation. J.A. 22. Counsel also requested, "no matter what happens," that the court stay execution of Mr. Frye's sentence so that Mr. Frye could complete some final exams at school. J.A. 22. Having received and considered the SAR, the court did not grant probation, and it imposed a three-year sentence; but the court stayed execution until two days after Mr. Frye's exams. J.A. 23.[3]

After delivery to the Department of Corrections, Mr. Frye filed a post-conviction motion alleging that counsel was ineffective for failing to tell Mr. Frye about the State's November 15, 2007, plea offer. J.A.

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[3] The SAR was not made part of the record on appeal, but, pursuant to MO. SUP. CT. RULE 29.07(a)(2) the SAR would have included "any prior criminal record of the defendant and such information . . . as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant." At the post-conviction evidentiary hearing, Mr. Frye acknowledged that he has four prior felony convictions, and several prior misdemeanor convictions. J.A. 34-35.

25-26. The court held an evidentiary hearing and denied the motion, concluding, *inter alia*, that Mr. Frye had failed to show prejudice, in that Mr. Frye had failed to allege or prove that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial. J.A. 30, 52-57.

In finding no prejudice, the court relied on the test established in *Hill v Lockhart*, 474 U.S. 52, 59 (1985), which held that, after a guilty plea, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *See* J.A. 53-56. Consistent with this test, the motion court concluded, "Because [Mr. Frye] has failed to claim, either at the evidentiary hearing or in his motion, that he would have gone to trial but for his trial counsel's actions . . . this Court finds that [Mr. Frye] is entitled to no relief." J.A. 57.

Mr. Frye appealed, and the State argued that Mr. Frye had failed to show prejudice as required by *Hill*. *See* J.A. 70. The Missouri Court of Appeals rejected that argument and concluded that the post-conviction motion court had clearly erred in applying *Hill*'s test for prejudice to Mr. Frye's claim. J.A. 76. The court of appeals declined to apply *Hill*:

> We conclude that though prejudice may, and often will, be established by a defendant's showing that 'but for' counsel's ineffective assistance, the defendant would not have pled guilty and would have insisted on going to trial, this is not the only way prejudice can be established.

J.A. 72. Relying on *Strickland v. Washington*, 466 U.S. 668 (1984), the court then held that Mr. Frye

could show prejudice if he could show that but for counsel's error, there was a reasonable probability that "the result of the proceeding would have been different"—i.e., a reasonable probability that, but for counsel's error, he would have accepted the state's earlier (and better) plea offer. J.A. 72-76.

The court then observed that the offer was better because, under the terms of the offer, the State would have reduced the charge and the sentencing court would have been limited to imposing up to one year of imprisonment (instead of up to four years for the felony). J.A. 77-78.[4] But, although the court's prejudice analysis was premised upon its conclusion that Mr. Frye lost a favorable agreement, the court ultimately recognized that it could not order specific performance of the lost plea offer. J.A. 79. The court observed, "we are not empowered to order the State to reduce the charge against Frye." J.A. 79. Thus, the court vacated Mr. Frye's guilty plea and remanded the case so that Mr. Frye could "proceed to trial or plead guilty to and be resentenced for the same felony driving while revoked charge to which Frye originally entered his 'open' guilty plea." J.A. 79.

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[4] In reaching this conclusion, the court included a misstatement of Missouri law; the court stated: "had Frye been advised of the Offer, and had he accepted the Offer, the trial court would have been bound to accept the guilty plea for the misdemeanor charge." J.A. 77-78. In fact, the trial court would not have been bound to accept the guilty plea, *see* MO. SUP. CT. RULE 24.02(d)4; rather, if the trial court had accepted the plea, it would have been bound to sentence Mr. Frye within the misdemeanor range of punishment.

SUMMARY OF THE ARGUMENT

1. The Sixth Amendment to the United States Constitution guarantees counsel to the accused in criminal prosecutions. This guarantee is more than a guarantee of having counsel present only at the trial itself. In light of the various tools that are employed by the prosecution during a criminal prosecution, the counsel guarantee has been extended to pre-trial events to protect the unaided layperson at critical confrontations with the prosecution.

2. To give meaning to the Constitution's promise of having the assistance of counsel for a defense, the Court has held that the right to counsel is the right to the *effective* assistance of counsel. But, that said, the right to effective assistance is not provided for its own sake, but because it aids the accused in receiving a fair trial. Accordingly, the Court has held that the right to the effective assistance of counsel is limited to ensuring a fair trial.

In *Strickland*, the Court established the test for evaluating whether counsel's alleged errors deprived the accused of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687-688, 694 (1984). Relying on the framework established in *Strickland*, the Court also established a test for evaluating whether counsel was ineffective during guilty-plea proceedings. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). But, in *Hill*, instead of examining whether counsel's errors affected the reliability of the factfinder's verdict, the Court held that "to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 58.

While stated differently, the two tests found in *Strickland* and *Hill* aim to protect the same right: the right to a fair trial. The *Strickland* test protects that right by ensuring that the factfinder's ability to determine guilt or innocence was not fettered by the mistakes of counsel and was, instead, governed by correct standards and reliable evidence. The *Hill* test, on the other hand, protects the right by ensuring that the accused is not unfairly deprived of the right altogether.

3. Here, Mr. Frye alleges that he was prejudiced not because he was deprived of his right to a fair trial, but because counsel failed to tell him about a favorable plea offer that he would have accepted if counsel had told him about it. But the loss of a favorable plea bargain—even if the outcome would have been better than what the accused received—is not the sort of "prejudice" that *Strickland* and *Hill* sought to guard against. The accused has no right to a plea bargain, and a plea bargain standing alone has no constitutional significance.

While the entry of a guilty plea is certainly a critical confrontation with the prosecution, the plea negotiations that precede a plea are only critical in the general sense of the word, and only insofar as they prompt or inform a waiver of the accused's right to a fair trial. In other words, when a plea offer is rejected, or when negotiations are unsuccessful, the accused's right to a fair trial is not infringed in any way, and what follows thereafter should be judged according to the terms of *Strickland* and *Hill*.

Accordingly, here, where the State made a plea offer, but that offer was not communicated to Mr. Frye, there was no confrontation between Mr. Frye and the prosecutorial forces of the State. The State

obtained no advantage over Mr. Frye as a result of the plea offer, and Mr. Frye lost no constitutional right. Mr. Frye may have lost a potential benefit, *i.e.*, the favorable terms of the plea offer, but he was not deprived of any substantive or procedural right.

4. In arguing that he was prejudiced by the loss of the plea offer, Mr. Frye is urging the adoption of a purely result-oriented test for prejudice—*i.e.*, if there is a reasonable probability that the result of the criminal case would have been more favorable to the accused then Mr. Frye was prejudiced. But the Court has held that a prejudice analysis that focuses only on the outcome is defective. If counsel's error does not deprive the accused of any substantive or procedural right, then it cannot be said that the proceeding was unreliable or unfair. In other words, the loss of a more favorable outcome is not always a legitimate means of proving prejudice.

A result-oriented test in this case would also place an unfair burden on the state and present practical problems. Ordinarily, the State bears the burden of counsel's errors because, if a conviction is obtained in a proceeding in which the accused is deprived of the effective assistance of counsel, the State has unconstitutionally deprived the accused of his liberty. Here, though, Mr. Frye does not assert that his conviction was the result of an unfair guilty-plea proceeding.

If the State is compelled to bear the burden of errors that occur during failed plea negotiations, there will be an incentive for counsel to allow or create failures in plea negotiations. For, once counsel has a favorable plea offer in hand, the offer will act as an "insurance policy" against worse results at trial. There will be no risk in gambling for an acquit-

tal at trial, because if the trial turns out worse than the lost plea offer, the accused will be able to obtain post-conviction relief and seek another outcome. This will lead to waste of judicial resources, and it could cause prosecutors to refrain from even engaging in plea negotiations.

5. Even if a lost plea offer constitutes "prejudice" under *Strickland* and *Hill*, Mr. Frye is not entitled to any further remedy because his conviction was obtained through a constitutionally adequate guilty-plea proceeding. If the accused receives ineffective assistance of counsel at trial, the remedy is to order a new trial—not to order an acquittal. Similarly, here, the appropriate remedy was not to order specific performance of the lost plea offer, but to accord Mr. Frye a fair trial or guilty plea. And inasmuch as Mr. Frye validly waived his right to trial and pleaded guilty, no further remedy is appropriate.

Moreover, because Mr. Frye's guilty plea was a break in the chain of events that preceded it, he cannot raise independent constitutional claims that occurred prior to the plea. Mr. Frye's claim of ineffective assistance of counsel is independent from his guilty plea because the alleged error did not affect the knowing, intelligent, and voluntary nature of his plea. In short, Mr. Frye "was fully aware of the likely consequences when he pleaded guilty; it is not unfair to expect him to live with those consequences now." *Mabry v Johnson*, 467 U.S. 504, 511 (1984).

ARGUMENT

I. The Sixth Amendment seeks to ensure a fair trial by guaranteeing the right to counsel at trial and during "critical confrontations" with the State's prosecutorial forces.

One aim of the Sixth Amendment is to guarantee fairness to the accused at trial. As the Court stated in *Strickland v. Washington*, 466 U.S. 668, 684-685 (1984), "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause[.]"

Similarly, the Court has stated that "the 'core purpose' of the counsel guarantee is to assure aid at trial, 'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.' " *United States v. Gouveia*, 467 U.S. 180, 188-189 (1984). The "right to counsel exists to protect the accused during trial-type confrontations with the prosecutor." *Id.* at 190.

To provide the requisite protection, the Court has held that the right to counsel is not limited to having counsel present "only at the trial itself." *See Kirby v. Illinois*, 406 U.S. 682, 688 (1972). Rather, the Sixth Amendment's aim is "protecting the unaided layman at critical confrontations with his adversary[.]" *Gouveia*, 467 U.S. at 189. Extending the Sixth Amendment's right to counsel to "critical confrontations" that precede trial has been deemed necessary because the fairness of trial is often dependent on pre-trial events.

The right to counsel attaches, then, when adversary proceedings have been initiated against

the accused. *Kirby*, 406 U.S. at 688. Focusing on that moment, the Court recognized that "perhaps the most critical period of the proceedings . . . [is] the time of . . . arraignment until the beginning of . . . trial." *Powell v. Alabama*, 287 U.S. 45, 57 (1932). Thus, in *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961), the Court held that "in Alabama [arraignment] is a critical stage in a criminal proceeding," for "[w]hat happens there may affect the whole trial." The Court pointed out that, under Alabama law, certain defenses otherwise available at trial could be "irretrievably lost, if not then and there asserted." *Id.* The Court observed that at such proceedings, "[t]he guiding hand of counsel is needed . . . 'lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed.' " *Id.* at 54-55.

A few years after *Powell*, in *Massiah v. United States*, 377 U.S. 201, 204-206 (1964), the Court held that a surreptitious, post-indictment interrogation of the accused by a government agent was a confrontation where counsel's aid was critical because it resulted in evidence "used against [the defendant] at his trial." The Court explained:

> A Constitution which guarantees a defendant the aid of counsel at . . . trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less . . . might deny a defendant "effective representation by counsel at the only stage when legal aid and advice would help him."

Id. at 204 (quoting *Spano v. New York*, 360 U.S. 315, 326 (1959) (Douglas, J., concurring)).

In *United States v. Wade*, 388 U.S. 218, 219-220, 236-237 (1967), the Court held that a "post-indictment lineup conducted for identification purposes" was also a critical confrontation. The Court observed that "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *Id.* at 224. The Court continued: "It is central to that principle [of having a fair opportunity to present a defense at trial] that in addition to counsel's presence at trial,[] the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Id.* at 226 (footnote omitted). Accordingly, the Court concluded that "we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." *Id.* at 227.

In short, "critical confrontations" include pre-trial proceedings where " 'the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both,' . . . in a situation where the results of the confrontation 'might well settle the accused's fate and reduce the trial itself to a mere formality.' " *Gouveia*, 467 U.S. at 189. "It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the

intricacies of substantive and procedural criminal law." *Id.*

All these critical-confrontation cases involved the *absence* of counsel during what were held, or alleged, to be stages of a prosecution that were critical because of their effect on any future trial. They did not directly address claims of ineffective assistance of counsel. Thus, while they address the broader question of when counsel must be *provided* to the accused, they do not address the separate, more specific question of what constitutes the *effective* assistance of counsel during such stages of trial. Nevertheless, these cases provide a framework for determining whether a given pre-trial event is a "critical confrontation," and they affirm the general principle that prejudice must be gauged by examining whether counsel's presence or absence (or—as the case may be in gauging counsel's effectiveness—counsel's action or inaction) "might derogate from the accused's right to a fair trial." *Wade*, 388 U.S. at 226.

II. The Sixth Amendment right to the *effective* assistance of counsel is limited to preserving the right to a fair trial.

As a natural corollary to the overarching purpose of the Sixth Amendment, it has long been recognized that "the right to counsel is the right to the *effective* assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970) (emphasis added). But, while the right to counsel plays an important role in criminal prosecutions, "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658 (1984). In other words, the

right to the effective assistance of counsel is bounded, or limited, by the right to a fair trial: "Having derived the right to effective representation from the purpose of ensuring a fair trial, we have, logically enough, also derived the limits of that right from that same purpose." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006).

In *Strickland v. Washington*, 466 U.S. at 668, the Court established the now-familiar two-part test for determining whether the accused in a criminal case has been deprived of the right to the effective assistance of counsel. First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-688. Second, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In discussing the application of the second part of this test—the test for "prejudice"—the Court explained, "When a defendant challenges a conviction [obtained after a trial], the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

Although the *Strickland* test was tied to the reliability of the factfinder's determination of guilt at trial or trial-like proceedings, the Court held in *Hill v. Lockhart*, 474 U.S. 52, 57 (1985), that *Strickland*'s "two-part standard [is also] applicable to ineffective-assistance claims arising out of the plea process." 474 U.S. at 57. But the Court altered the showing that the accused must make to prove prejudice: "to satisfy the 'prejudice' requirement [after a guilty plea], the defendant must show that there is a reasonable probability that, but for counsel's errors, he would

not have pleaded guilty and would have insisted on going to trial." *Id.* at 58. In other words, after a guilty plea, prejudice is not gauged in terms of the reliability of the factfinder's verdict; rather, prejudice is gauged in terms of the validity of the accused's waiver of the right to trial.

While stated differently, both the *Strickland* test and the *Hill* test aim to protect the accused's right to a fair trial. The *Strickland* test protects that right by seeking to ensure that the factfinder's ability to determine guilt or innocence was not fettered by the mistakes of counsel and was, instead, governed by correct standards and reliable evidence. The *Hill* test, on the other hand, protects the right to a fair trial by seeking to ensure that the accused is not unfairly deprived of the right altogether. It does so by ensuring that the accused's guilty plea and concomitant waiver of trial is knowing, intelligent, and voluntary. In either case—after a trial or after a guilty plea—if counsel's error results in the requisite prejudice, the remedy is to restore the defendant's right to a fair trial by vacating the judgment and ordering a new trial.

In sum, because the right to the effective assistance of counsel is limited to preserving the accused's right to a fair trial, any test for evaluating counsel's efforts must ultimately rest on whether the accused was robbed of a fair trial. Thus, here, where the case was resolved through a guilty plea, the question is, as the Court aptly stated in *Hill*, whether Mr. Frye, but for counsel's error, "would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59.

III. Because plea negotiations are not a critical confrontation with the prosecution, and because counsel's error here in failing to communicate a plea offer did not infringe on Mr. Frye's right to a fair trial, there was no constitutional prejudice.

Here, Mr. Frye did not allege or prove that he was robbed of his right to a fair trial—he did not allege that, but for counsel's error in failing to convey the State's plea offer, he would not have pleaded guilty and would have insisted on going to trial. *See* J.A. 27-28, 34, 37. Mr. Frye's claim of prejudice was merely that, if counsel had informed Mr. Frye of the State's plea offer, there was a "reasonable probability . . . that [the trial judge] would have accepted the plea bargain to the amended misdemeanor charge, [that Mr. Frye] would have pled thereto and been sentenced in accordance with the plea offer, and consequently he would have avoided a felony conviction and would have served only ninety days in the county jail rather than three years in prison." J.A. 27-28. In short, Mr. Frye alleged that, if counsel had told him about the State's plea offer, he would have pleaded guilty sooner and obtained a lesser conviction and sentence.

But this sort of "prejudice"—the lost benefit of a favorable plea offer—is not the sort of prejudice that *Strickland* and *Hill* were designed to guard against. *See generally Premo v. Moore*, 131 S.Ct. 733, 745 (2011) (stating that, in light of the test in *Hill*, it was not "clearly established" that the probability of a "better plea agreement" would constitute "prejudice for *Strickland* purposes"). The question here, then, is whether plea negotiations that did not result in a guilty plea constitute a "critical confrontation" that

gives rise to the right to the effective assistance of counsel during such negotiations.

A. The negotiations that precede a plea bargain may be important to the accused in deciding to waive trial, but they are not a "critical confrontation" with the prosecution, particularly if they are unsuccessful, *i.e.*, if the accused does not waive trial.

In *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), the Court observed that "[t]he entry of a guilty plea . . . ranks as a 'critical stage' at which the right to counsel adheres." In another case that resulted in a guilty plea, *Padilla v. Kentucky*, 130 S.Ct. 1473, 1486 (2010), the Court observed that plea negotiations are a "critical phase of litigation." These observations make sense in cases where the accused waived the right to trial in conjunction with accepting a specific plea offer, because waiving the right to trial in such cases settles the accused's fate, and the negotiations could have impelled the accused to waive trial.

But the Court has never held that a plea bargain standing alone has constitutional significance, or that the accused has any right to receive one. *See Mabry v. Johnson*, 467 U.S. 504, 507 (1984) ("A plea bargain standing alone is without constitutional significance[.]"); *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) ("there is no constitutional right to plea bargain"). Thus, while plea negotiations can be "critical" in the general sense of the word, unaccepted plea offers and unsuccessful negotiations, unlike actual guilty-plea hearings, are not "critical confrontations" in which the effectiveness of counsel demands constitutional protection.

This is not to suggest that counsel has no duty to consult with the accused when the State extends an offer. To the contrary, under professional and ethical norms, counsel should be expected to discuss legitimate, acceptable offers with the accused. In addition, given the benefits that can accrue to the accused through plea bargaining, it might behoove counsel in a given case to discuss with the accused the possibility of approaching the prosecutor with an offer to waive trial in hopes of securing a plea bargain from the prosecutor. Such practices are widespread, and "defense attorneys must make careful strategic choices in balancing opportunities and risks." *Premo v. Moore*, 131 U.S. at 741.

But, while many complexities enter into the plea-bargaining process, and while counsel certainly *can* broker favorable results through the plea-bargaining process, it does not necessarily follow that counsel's *failing* to broker such favorable results outside the trial process constitutes "prejudice" of the sort justifying relief under *Strickland* and *Hill*. Indeed, because "the Sixth Amendment right to counsel exists . . . in order to protect the fundamental right to a fair trial," 466 U.S. at 684, there is no justification for extending that right to protect the defendant's purported right to receive the most favorable result that would have been possible or probable through more successful plea bargaining.

On the other hand, it can hardly be gainsaid that counsel's advice in deciding whether to waive trial and plead guilty is critical. The critical importance of counsel's assistance during plea negotiations that result in a waiver of trial has been recognized by the Court, but in such cases, the adequacy of counsel's performance has been gauged in terms of whether the defendant's waiver of trial and guilty plea were

knowing, intelligent, and voluntary. *See Hill*, 474 U.S. at 56-57 (" 'As we explained in *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973), a defendant who pleads guilty upon the advice of counsel 'may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.' "). Thus, the critical nature of counsel's advice during plea negotiations lies not in counsel's ability to obtain certain favorable results, but in counsel's obligation to protect the defendant's right to a fair trial.

There is broad language in *Padilla v. Kentucky* that could be read to suggest that all "plea negotiations" are a "critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." 130 S.Ct. at 1486 (citing *Hill*, 474 U.S. at 57). But *Padilla*'s reliance on *Hill* indicates that plea negotiations are "critical" only because they can induce the accused to waive trial and plead guilty—any suggestion beyond that was *dicta*. And a review of *Padilla* confirms that the case did not alter the test for determining prejudice.

In *Padilla*, the defendant alleged that counsel was ineffective in advising him about deportation consequences that would follow his guilty plea. 130 S.Ct. at 1478. The defendant alleged that counsel not only failed to advise him of the consequences, but affirmatively told him that he "did not have to worry about immigration status since he had been in the country so long." *Id*. The defendant alleged he relied on counsel's advice in pleading guilty, and "he would have insisted on going to trial if he had not received incorrect advice from his attorney." *Id*. It was in that specific context—where the defendant alleged that he would not have given up his right to trial—that

the Court held that counsel's performance was deficient, and that the Court further observed that "we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Id.* at 1486.

Accordingly, *Padilla* should be read as referring to "the negotiation of a plea bargain" that actually results in a waiver of trial and the entry of a guilty plea. In such cases, plea negotiations become critical because they will often be an important factor that influences the accused's decision to waive trial and plead guilty. The "critical confrontation" with the State still takes place at the guilty-plea hearing itself. Indeed, although the Court in *Padilla* expressly declined to decide the issue of prejudice, the Court seemingly recognized that prejudice must be tied to the defendant's decision to waive trial and plead guilty. *See generally id.* at 1485 ("to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain [and insist upon trial] would have been rational under the circumstances.").

In light of *Mabry*, it makes sense to invest the guilty plea and waiver of trial (as opposed to the plea bargain) with constitutional significance, for there is no right to a plea bargain, but there is a right to trial. And it is at the guilty-plea hearing that the accused will waive that right and be "'. . . brought before a tribunal with power to take his life or liberty[.]'" *See Gouveia*, 467 U.S. at 189 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462-463 (1938)). As the Court stated in *Mabry*, "It is the ensuing guilty plea that implicates the Constitution." 467 U.S. at 507-508. And it does so because it entails both a waiver of the accused's right to trial and the loss of

liberty. Thus, if counsel—due to some error—merely fails to secure a plea bargain, the accused cannot be constitutionally prejudiced by such an error because unsuccessful plea negotiations do not entail a waiver of the accused's right to trial.

Limiting claims of prejudice to the accused's waiver of trial and guilty plea also makes sense because it protects the fundamental interests of finality. The Court recognized as much in *Hill*: "a showing of 'prejudice' from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas." 474 U.S. at 58. The Court observed that finality was particularly important in guilty-plea cases, given the great number of such cases:

> "Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions results from such pleas."

Id. (quoting *United States v. Timmreck*, 441 U.S. 780, 784 (1979)). These concerns remain true today. In fiscal year 2010, the Missouri circuit courts resolved 34,402 felony cases by trial and guilty plea. Of those cases, 33,539—97.49%—were resolved by guilty pleas.[5] In federal courts, the numbers are

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[5] *See* Table 51, "2010 Annual Report – Supplement, Circuit Court - Cases Disposed: Tables 51-56, CIRCUIT AND ASSOCIATE CRIMINAL: Felony cases. Manner of disposition by

similar, with 96.64% of convictions in fiscal year 2008 being obtained after a guilty plea.[6]

There is language in *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978), suggesting that an accused is prejudiced when, due to an actual conflict of interest, counsel fails to "explor[e] possible plea negotiations" for one of the individual defendants. But this language should not be read to mean that, in the ordinary case, counsel will be deemed ineffective for failing to procure a particular plea agreement for the accused.

In *Holloway* the Court confronted one of the rare circumstances in which prejudice from the denial of counsel must be presumed. Three defendants were forced to stand trial in a criminal case while represented by a single attorney who was, under the circumstances, laboring under an actual conflict of interest. The Court refused "to indulge in nice calculations as to the amount of prejudice" arising from the conflict. *Id.* at 488. Instead, the Court held that when a conflict of interest actually affects the adequacy of counsel's representation "prejudice is presumed regardless of whether it was independently shown." *Id.* at 489. In other words, the case did not hold that an attorney's failing to obtain a particular plea bargain would, in itself, constitute the sort of "prejudice" later identified in *Strickland*. Rather, in observing that counsel was prevented from seeking possible plea bargains, the Court in *Holloway* was

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circuit and county," available at http://www.courts.mo.gov/file.jsp?id=43754 (accessed on April 14, 2011).

[6] *See* Table 4.2, "Federal Justice Statistics, 2008-Statistical Tables," available at http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/tables/fjs08st402.pdf (accessed on April 14, 2011).

merely listing the myriad ways an actual conflict of interest can curtail counsel's efforts. *Id.* at 489-490.

Additionally, *Holloway* was decided several years before *Strickland* and *Hill*; thus, to the extent that it suggests that the right to the effective assistance of counsel guarantees more than the right to a fair trial, it conflicts with the Court's subsequent decisions. In both *Strickland* and *Hill*, the Court made plain what is required to demonstrate prejudice from the ordinary errors of counsel, and in neither case did the Court suggest that a defendant could show prejudice by proving that, but for counsel's alleged error during plea negotiations, there was a reasonable probability that the defendant would have pleaded guilty to a more favorable plea agreement. Rather, the defendant must show either that the verdict rendered by the factfinder at trial was unreliable, i.e., that his trial was actually unfair (*Strickland*), or that he was unfairly deprived of his Constitutional right to trial altogether (*Hill*).

B. The State's plea offer to, or attempted plea negotiation with, Mr. Frye was not a "critical confrontation" to which the Sixth Amendment attaches a right to the effective assistance of counsel.

The State's plea offer to Mr. Frye, via his counsel, was not a "confrontation" involving Mr. Frye and "the prosecutorial forces of organized society." *Gouveia*, 467 U.S. at 189. Plea offers are often made under circumstances that do not involve the accused in any fashion. For instance, a prosecutor and defense attorney might run into each other in the hallway of the courthouse or at a local restaurant and discuss several offers without ever pausing to allow defense counsel to discuss the various offers

with the accused. Such conversations do not subject the defendant to any sort of proceeding or "confrontation" with "prosecutorial forces." There is no danger that the defendant will, because of such a conversation, unwittingly settle his fate or give up the right to trial. Moreover, if defense counsel alienates the prosecutor (*e.g.*, by asking for an unreasonable concession) and causes the prosecutor to immediately retract all of the offers, the accused should not be allowed to claim prejudice, because the accused's right to a fair trial has not been affected. Without a direct connection to events at trial or a waiver of trial, such conversations are not a "critical confrontation."

Here, when the state extended its plea offer, Mr. Frye was not subjected to any pre-trial procedures, and he was not confronted by any state agent. He was not, for example, required to assert any defenses (i.e., his trial was not affected in any fashion); he was not subjected to interrogation (i.e., no incriminating evidence was procured); and he was not placed in a lineup (i.e., no incriminating evidence was obtained under circumstances where Mr. Frye's right to confrontation was infringed). Rather, the State's plea offer was delivered to Mr. Frye's attorney, and Mr. Frye was never aware of the offer until after it had expired. The offer never exerted any kind of force on Mr. Frye, and it had no effect on his ability to receive a fair trial. Thus, the state's attempted plea negotiation was not a critical confrontation.

Of course, Mr. Frye's claim is that counsel *should* have communicated the State's plea offer to him, so that Mr. Frye could have been induced to waive his right to trial sooner. But this claim necessarily rests on the assumption that Mr. Frye's right to counsel encompassed something more than the right to a fair

trial—namely, that Mr. Frye also had a right to plead guilty to a particular plea offer once it was made by the State.

But there is no constitutional right to a plea bargain—even if the prosecutor extends a plea offer to the accused, and even if the accused agrees to accept it. "A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest." *Mabry*, 467 U.S. at 507. And, consistent with this principle, under Missouri rules, the trial court can reject any plea agreement. *See* MO. SUP. CT. RULE 24.02(d)4.

The Court in *Mabry* was analyzing whether the prosecutor could, consistent with the demands of the Due Process Clause, withdraw a plea offer after it had been accepted by the defendant. *See id.* at 505-506, 509. But that distinction should make no difference here. As the Court stated in *Strickland*, "the Sixth Amendment right to counsel exists . . . in order to protect the fundamental right to a fair trial." 466 U.S. at 684. It would make little sense to say the Constitution requires counsel to effectively defend or assert a purported "right" not even guaranteed by the Due Process Clause.

IV. Mr. Frye's result-oriented test for prejudice lacks a constitutional basis, and places unfair burdens on the state.

In asserting that he was prejudiced by the loss of a favorable plea offer, Mr. Frye urged the adoption of a result-oriented test that compares the ultimate result of his guilty plea with the result that might

have occurred if counsel had told him about the earlier plea offer. But as discussed above, the test adopted by *Strickland* and *Hill* was designed to protect the accused's right to a fair trial—not to ensure the best possible outcome or sentence for the accused. *See Kimmelman v. Morrison*, 477 U.S. 365, 396-397 (1986) ("it would shake that right [to the effective assistance of counsel] loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall") (Powell, J., concurring).

Moreover, the rule that Mr. Frye urges is problematic in several respects. It unfairly places a burden on the State for the mistakes of defense counsel, and, depending on the remedy, it could unfairly burden the state by forcing the state to try cases after considerable delay. It will also create an incentive for defense attorneys to withhold favorable plea offers from their clients, as plea offers will be viewed as "insurance policies" against worse outcomes after trial; and, as a consequence, it will complicate the fluid nature of plea negotiations and cause prosecutors to refrain from even making offers.

A. A result-oriented test for prejudice would go beyond the Court's precedents and their constitutional basis.

Because the *Strickland* test for prejudice focuses on the verdict obtained at trial, there is a natural inclination to simply gauge prejudice from counsel's alleged errors by evaluating whether it is reasonably probable that the outcome of the case would have been more favorable to the defendant. Indeed, in *Strickland*, the Court spoke of prejudice in terms of "a result more favorable to the defendant." 466 U.S.

at 695. That is the kind of language on which Mr. Frye and the Missouri Court of Appeals crafted a test that looks for a "more favorable" result.

But that language does not constitute the holding in *Strickland*. Indeed, at the same time the Court was mentioning "a result," the Court also made plain that the prime concern in evaluating counsel's assistance is the reliability of the verdict. *See id.* at 691-692 ("The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."). *See Kimmelman v. Morrison*, 477 U.S. at 392-393 ("As *Strickland* makes clear, the right to effective assistance of counsel is personal to the defendant, and is explicitly tied to the defendant's right to a fundamentally fair trial—a trial in which the determination of guilt or innocence is "just" and "reliable.") (Powell, J., concurring). And, consistent with *Strickland*'s emphasis on reliability, the Court has recognized that there are "situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice.'" *Williams v. Taylor*, 529 U.S. 362, 391-392 (2000).

One such situation arose in *Lockhart v. Fretwell*, 506 U.S. 364, 366 (1993). There, the Court examined whether counsel was ineffective for failing to object to one of the state's aggravating circumstances in a capital sentencing proceeding. Based on case law that controlled at the time of his trial, the defendant argued that counsel should have objected to an aggravating circumstance that merely duplicated one of the elements of the underlying felony. *Id.* at 367. The defendant argued that, if counsel had objected and had the aggravating circumstance removed from the case, there was a reasonable probability that he

would not have been sentenced to death. *Id.* The United States District Court for the Eastern District of Arkansas agreed and held that counsel "had a duty to be aware of all law relevant to death penalty cases[.]" *Id.* The district court thus vacated the defendant's sentence of death. *Id.*

Thereafter, even though the case law that would have supported trial counsel's objection had been overruled, the United States Court of Appeals for the Eighth Circuit affirmed the district court's decision. *Id.* at 368. A majority held that "had counsel made the objection, the trial court would have sustained the objection and the jury would not have sentenced [the defendant] to death." *Id.* But a dissenting judge argued "that *Strickland* prejudice involves more than a determination that the outcome would have been different—it also involves the concepts of reliability and fairness." *Id.*

This Court granted certiorari and concluded that, because the case law that would have supported the objection had since been overruled—*i.e.*, because the trial had actually followed constitutionally adequate procedures—trial counsel was not ineffective. The Court began by observing, "Our decisions have emphasized that the Sixth Amendment right to counsel exists 'in order to protect the fundamental right to a fair trial.' " *Id.* (quoting *Strickland*, 466 U.S. at 684). The Court then observed that a prejudice "analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." 506 U.S. at 369. The Court recognized that "mere outcome" evaluation can produce unjust results: "To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the

defendant a windfall to which the law does not entitle him." *Id.* 369-370.

Accordingly, the Court held that "[u]nreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Id.* at 372. *See also id.* at 375 (the defendant's claim of prejudice was based on "the suggestion that he might have been denied 'a right the law simply does not recognize[.]' ") (O'Connor, J., concurring). In short, although a more "favorable" outcome was reasonably probable had counsel objected, the reliability of the trial—not the favorability of the outcome—was the appropriate gauge for determining whether the defendant was prejudiced. *See Williams v. Taylor*, 529 U.S. at 392 ("in *Lockhart*, we concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential 'windfall' to the defendant rather than the legitimate 'prejudice' contemplated by our opinion in *Strickland*."); *see also Cronic*, 466 U.S. at 658 ("Absent some effect of challenged conduct on the reliability of the . . . process, the [effective counsel] guarantee is generally not implicated.").

In *Nix v. Whiteside*, 475 U.S. 157 (1986), the Court identified another circumstance where simple outcome analysis runs contrary to the weightier aims of the Sixth Amendment. There, the defendant asserted that counsel was ineffective because counsel would not cooperate with the defendant in presenting perjured testimony. *Id.* at 162. The Court rejected the defendant's claim, holding that counsel's duty "is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth."

Id. at 166. In evaluating whether the defendant was prejudiced, the Court concluded that the defendant had "no valid claim that confidence in the result of his trial has been diminished by his desisting from the contemplated perjury." *Id.* Indeed, had counsel allowed the defendant to offer false testimony, any reliance by the jury on the perjurious testimony would have undermined the reliability of the verdict. *See id.* at 185 (Blackmun, J, concurring).

The decisions in *Lockhart v. Fretwell* and *Nix v. Whiteside* confirm that, under *Strickland* (and by extension *Hill*), reliability of the verdict is tied to the truth-seeking function of trial, i.e., the reliability of the factfinder's conclusions or the reliability of a guilty plea. Thus, if counsel's alleged error did not legitimately affect the reliability of the verdict, counsel's error is immaterial and there can be no *Strickland* prejudice.

An approach that focuses on the reliability of the truth-seeking function of trial—as opposed to whether the defendant was sentenced to ten years or five years—is superior because it accomplishes the ultimate aim of the Sixth Amendment, which is, as the Court stated in *Cronic*, to see "that the guilty be convicted and the innocent go free":

> The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. "[T]ruth," Lord Eldon said, "is best discovered by powerful statements on both sides of the question."[] This dictum describes the unique strength of our system of criminal justice. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best

> promote the ultimate objective that the guilty be convicted and the innocent go free."[] It is that "very premise" that underlies and gives meaning to the Sixth Amendment.[]

Cronic 466 U.S. at 655-56 (footnotes and citations omitted).

Here, there is no question that Mr. Frye is guilty of the charged offense, as he admitted his guilt at the guilty-plea hearing and he testified at his post-conviction evidentiary hearing that he still would have pleaded guilty even absent counsel's error. J.A. 18-19, 34, 37. The ultimate goal of the Sixth Amendment—reliability of Mr. Frye's conviction—was met by Mr. Frye's knowing, intelligent, and voluntary admission of guilt. In terms of the Constitution, any benefit beyond the protection of Mr. Frye's right to a fair trial would have been a windfall. In short, Mr. Frye's claim of prejudice rests on the assertion that he was denied the opportunity to obtain the best possible result—a right the Constitution simply does not recognize.

B. Except where the accused is unfairly deprived of the right to trial, the State should not bear the burden of counsel's errors during plea negotiations.

Generally, "[t]he Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel." ***Kimmelman v. Morrison***, 477 U.S. at 379. This is required because "[w]here a State obtains a criminal conviction in a trial in which the accused is deprived of the effective assistance of counsel, the 'State . . . unconstitutionally deprives the defendant of his liberty.'" *Id.* at 383 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980)).

Here, the State did not obtain a conviction "in a trial [or plea proceeding] in which the accused [was] deprived of the effective assistance of counsel." Rather, Mr. Frye had counsel; he was advised of his rights before pleading guilty, and he said that he understood them; he understood the consequences of his plea; and he knew that he could be sentenced to any term of years within the range of punishment. J.A. 14-17. Thus, because Mr. Frye's conviction was obtained through constitutionally adequate guilty-plea procedures, the State should not be forced to bear the burden of an error of counsel that occurred during failed plea negotiations.

Had Mr. Frye *invalidly* waived his right to trial, the State would be obligated to reinstate his right to a fair trial. "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to *the injury suffered from the constitutional violation* and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981) (emphasis added). Here, there was no "injury suffered from [a] constitutional violation," because Mr. Frye was not unfairly induced to waive his right to trial. In short, "There is no effect of a constitutional dimension which needs to be purged to make certain that [Mr. Frye] has been effectively represented and not unfairly convicted." *Id.*

C. A result-oriented test for prejudice will undermine the State's efforts to effectively administer justice, and it will hamper plea negotiations.

As discussed above, *Hill*'s test for prejudice has the benefit of protecting both the accused's right to trial and society's countervailing interests in the

finality of guilty pleas. Conversely, a result-oriented test that does not require the defendant to prove that his guilty plea was invalid could fail to preserve the interests of finality in a vast number of cases.

But it is not just the number of cases that may be affected that argues in favor of adherence to *Hill*. "The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges in cases not only where witnesses and evidence have disappeared, but also in cases where witnesses and evidence were not presented in the first place." *Premo v. Moore*, 131 U.S. at 745-746. Here, the State has been ordered by the Missouri Court of Appeals to allow Mr. Frye to plead guilty again—a useless exercise and a waste of judicial resources—or to allow Mr. Frye to stand trial. J.A. 79-80. If Mr. Frye elects to stand trial, the State will be forced to try the case after a significant passage of time, with all of the disadvantages that can accrue over time. It might be suggested that this will pose little difficulty for the state because Mr. Frye's case might involve only one witness (the police officer who caught Mr. Frye driving with a revoked license), but imposing such a rule will also affect more complicated and serious cases involving multiple witnesses.

Additionally, if Mr. Frye stands trial and receives a sentence similar to the sentence he previously received, the alleged "prejudice" of the lost plea offer remains. Is Mr. Frye then entitled to file another post-conviction motion and assert that counsel's failure to communicate the plea offer was prejudicial because the result of his trial was worse than he would have received under the terms of the plea offer? And can he raise such a claim even though his trial was fair and counsel performed as reasonable

counsel at trial? Certainly not; but if the lost plea offer has constitutional significance after a valid guilty plea, it is difficult to see how that significance would be erased by a fair trial.

Granting constitutional significance to lost plea offers will also adversely affect the administration of justice. In the future, a defendant who finds himself in Mr. Frye's position of having missed an expired plea offer might be advised to stand trial in hopes of obtaining an acquittal. This will carry no real risk, for if the outcome of trial is worse than the terms of the expired offer, the defendant will be able to assert in a post-conviction motion that he was prejudiced by counsel's failure to timely communicate the more favorable plea offer. Indeed, a shrewd defense attorney seeking the best possible outcome for the client might strategically allow a favorable plea offer to expire without communicating it to the defendant, knowing that the expired offer will act as a sort of insurance policy against worse results at trial. And if specific performance of the lost offer is deemed the appropriate remedy, then any offer can be pocketed by defense counsel and held in reserve as the minimum criminal liability that can be imposed.

It might be suggested that a potential remedy for such ploys would be to require communication of plea offers in court. It might also be suggested that the risk of such ploys is minimal because many offers are communicated in open court already. But the risk is not limited to cases where the plea offer is not communicated to the accused. The advice of counsel will always be important for a defendant faced with choosing between pleading guilty and going to trial; and, if a lost plea offer will act as an insurance policy against worse results at trial, counsel will have an

incentive to give the defendant unreasonable advice, to induce the accused to reject the plea offer.

On the other hand, if defense counsel is held responsible for errors during plea negotiations, then counsel's duty of loyalty to the client will impel reasonable steps to communicate the offer and give good advice about such offers. And it will be the rare case where counsel fails to do so; for, if counsel knows that the defendant will forever lose any plea offer that is not accepted, then counsel has no incentive to withhold it or provide unreasonable advice about it.

In the end, if a lost plea offer is deemed to be either an enforceable contract or a lost benefit that warrants a new trial, prosecutors will view plea negotiations with skepticism and trepidation, and plea negotiations will lose their fluidity. The risk of an unraveled guilty plea or trial will encourage prosecutors to withhold offers altogether or make less favorable offers. Indeed, if a prosecutor knows that any plea offer will be the effective minimum sentence in the case (i.e., if specific performance is deemed the appropriate remedy), the prosecutor will be inclined to refrain from plea negotiations altogether, and that is beneficial to no one.

V. Even if an error at the plea-bargain stage constituted ineffective assistance of counsel, Mr. Frye has already received the full relief appropriate: a new, fully adequate guilty plea proceeding.

In granting certiorari, the Court certified an additional question: "What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later

convicted and sentenced pursuant to constitutionally adequate procedures?" The key to answering that question lies not in the assumption in the first clause (injury in connection with the first plea offer), but in the fact stated in the second: that Mr. Frye's subsequent guilty plea and waiver of trial was knowing, intelligent and voluntary (i.e., that Mr. Frye was later "convicted and sentenced pursuant to constitutionally adequate procedures"). Two lines of precedent show that given what happened later, Mr. Frye is not entitled to any further remedy.

First, it has long been the rule that where the accused receives ineffective assistance of counsel, the remedy is to grant the accused a new trial—not to grant the accused what was probably lost due to counsel's error. Thus, in cases involving errors of counsel at trial, the question is whether, but for counsel's error, there is a reasonable probability that the factfinder would have had a reasonable doubt as to the accused's guilt. *Strickland*, 466 U.S. at 695. Where the accused actually proves prejudice, there is a reasonable probability that, but for counsel's error, the accused would have been acquitted. Yet, the remedy is not acquittal and discharge; the remedy is to vacate the unreliable conviction and order a new trial. And that new trial—even if it also results in a conviction—is a sufficient remedy for the earlier deprivation of the right to counsel. In other words, although it is reasonably probable that trial counsel's deficient performance deprived the accused of an acquittal, the appropriate remedy is simply a "constitutionally adequate procedure."

Here, instead of an acquittal, counsel's error may have cost Mr. Frye a lesser conviction and sentence. But like the accused who loses a reasonable probability of acquittal, Mr. Frye is not entitled to have

the lesser conviction and sentence entered in his behalf. He is only entitled to constitutionally adequate procedures as a remedy. And he has already been accorded a constitutionally adequate guilty-plea hearing.

Second, it has long been recognized that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Tollett v. Henderson*, 411 U.S. 258, 259 (1973). In *Tollett v. Henderson*, for example, the defendant alleged in a federal habeas petition that his constitutional rights had been violated because African-Americans had been excluded from the grand jury that indicted him. The Court rejected the claim, concluding, "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Id.* at 267.

Here, Mr. Frye solemnly admitted in open court that he was guilty, and his guilty plea was "in no sense induced by" counsel's failure to communicate the State's earlier offer. *See Mabry*, 467 U.S. at 510 ("Respondent's plea was in no sense induced by the prosecutor's withdrawn offer"). In fact, because Mr. Frye had no knowledge of the expired offer before he pleaded guilty, it could not have affected his decision to plead guilty. Mr. Frye decided to plead guilty independently of any plea offers, and he fully understood the possible consequences.

The constitutionally adequate proceedings that secured Mr. Frye's guilty plea and sentence were a sufficient remedy for any previous deprivation of the right to the effective assistance of counsel, and they

broke the chain of events that included ineffective assistance. Mr. Frye "was fully aware of the likely consequences when he pleaded guilty; it is not unfair to expect him to live with those consequences now." *Id.* at 511.

CONCLUSION

The Court should reverse the judgment of the Missouri Court of Appeals.

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April 15, 2011

RESPONDENT'S BRIEF

No. 10-444

IN THE

Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

GALIN E. FRYE,

Respondent.

ON WRIT OF CERTIORARI TO THE
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

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QUESTIONS PRESENTED

1. Consistent with the holding in *Strickland v. Washington*, 466 U.S. 668 (1984) – which held that to prove prejudice on a claim of ineffective assistance of counsel a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" – has prejudice been shown where defense counsel fails to inform the defendant that he can plead guilty to a misdemeanor with a maximum prison sentence of one year, and as a result of counsel's failure the defendant pleads guilty to a felony and receives a prison sentence of three years?

2. What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

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STATEMENT

1. On August 14, 2007, respondent Galin Frye was charged with one count of the felony of driving with a revoked license. J.A. 11-12. Michael Coles, a public defender, was appointed to represent him. J.A. 39-40. A preliminary hearing was scheduled for January 4, 2008. J.A. 59.

On November 15, 2007, the State sent Coles a written plea offer by mail. J.A. 40, 50. The offer was received in Coles' office on November 19. J.A. 40. Coles testified that he received and read the offer. J.A. 40. His highlighting and written notations on the letter confirm that he read the offer approximately a week after it was mailed to him. J.A. 40. The offer stated:

> My recommendation is a [sic] follows: 3
> and defer, on the felony with 10 days
> "shock" in the Boone County Jail; OR
> 90 days to serve on an amended misdemeanor
> in the Boone County Jail.
>
> I am going to subpoena witnesses for
> the preliminary hearing on January 4, 2008.
> I will need to know if Mr. Frye
> will be waiving to preserve the offer by
> noon on December 28, 2007.

J.A. 50, 59-60.

The first paragraph of the offer gave Frye a choice. He could either (1) plead guilty to the felony charge, in which case the prosecutor would recommend a three-year

prison sentence and defer to the court regarding probation but requested that Frye served ten days of "shock" time in jail; or (2) plead guilty to an amended information charging only a misdemeanor, in which case the prosecutor would recommend a sentence of ninety-days in jail. In the second paragraph, the prosecutor clearly explained that the offer would expire at noon on December 28.

Coles did not inform Frye of the offer. J.A. 60. The offer was open for more than a month, from November 15 to December 28, but Coles never made any effort to contact Frye during that period. He did not speak with Frye in person. He did not try to call Frye on the telephone. He did not mail Frye a letter. Frye was not hard to find. He was living in St. Louis, where he attended college. J.A. 38. Coles knew Frye's mailing address and telephone number. J.A. 38, 44. The offer expired on December 28, but Frye had still never heard about it.

After the offer expired, Coles made no effort to ask the prosecutor to extend the deadline. J.A. 44. He later claimed that this was because on December 30, two days after the deadline, Frye was arrested once again for driving with a revoked license. J.A. 44, 61. "[S]ometimes I could talk them into extending it," he testified. "But it would have been made more difficult by the fact that . . . he had picked up a new case." J.A. 44.

In March 2008, Frye entered an "open" guilty plea (i.e., a plea in which the prosecutor does not promise to recommend any particular sentence) to the felony of driving with a revoked license. J.A. 13, 61. He had still never heard about the opportunity to plead guilty to a misdemeanor, under the terms of the plea offer that had

expired back in December. J.A. 27 & n.2. At sentencing the prosecutor adhered to the terms of the expired plea offer, telling the court, "Our recommendation is three and defer. We would request 10 days shock in the Boone County Jail." J.A. 22. This recommendation was identical to the first of the two options in the expired plea offer. J.A. 61. The court sentenced Frye to three years of imprisonment. J.A. 23, 61. Frye began serving his prison sentence in May 2008. J.A. 25.

2. Frye first learned about the expired plea offer while he was incarcerated, when post-conviction counsel discovered it. J.A. 27 & n.2, 33. Frye moved to vacate his conviction, on the ground that he had been denied the effective assistance of counsel when defense counsel Michael Coles failed to inform him of the plea offer. J.A. 25, 29. He explained that had he been informed of the opportunity to plead guilty to a misdemeanor, he would have done so. J.A. 26, 34.

The court determined that even if Coles was at fault for failing to inform Frye of the plea offer, Frye could not establish ineffective assistance of counsel, because in his motion, Frye had not alleged that he "would have gone to trial but for his counsel's errors." J.A. 53. Such an allegation, the court believed, was a requirement in a claim for ineffective assistance of counsel during plea negotiations. J.A. 53-55. Nor was Frye entitled to a remand, the court held, because on remand there would be no way to require the State to renew the plea offer. J.A. 56-57. The court accordingly denied Frye's motion to vacate his conviction. J.A. 57.

3. The Missouri Court of Appeals reversed. J.A. 58-80. The court applied the two-part standard set forth in Strickland v. Washington, 466 U.S. 668 (1984), and determined that Frye had been denied effective assistance of counsel.

Under the first part of the Strickland standard, the court found that "Frye's trial counsel had an absolute duty to keep Frye informed of plea communications." J.A. 68. Frye had not prevented Coles from carrying out this obligation. J.A. 69. Rather, "[t]he record is void of any evidence of any effort by trial counsel to communicate the Offer to Frye during the Offer window." J.A. 69. The fault accordingly lay with Coles, not with Frye. J.A. 69-70. Further, the court explained, "[w]e can conceive of no reasonable trial strategy that would justify counsel's failure to communicate the Offer to Frye." J.A. 65.

Under the second part of the Strickland standard, the Court of Appeals held that the motion court erred as a matter of law in requiring Frye to allege that he would have gone to trial but for counsel's ineffective assistance. J.A. 70-76. The correct standard of prejudice under Strickland, the Court of Appeals noted, required Frye to "show a reasonable probability that, but for counsel's alleged deficiencies, the result of the proceeding would have been different." J.A. 70. The court found that Frye had made this showing. "Because of trial counsel's failure to inform Frye of the Offer," the court determined, "Frye pled guilty to a felony instead of a misdemeanor and was subject to a maximum sentence of four years instead of one year." J.A. 78. The court thus concluded that "Frye did sufficiently prove, by a preponderance of the evidence, that he was prejudiced through trial counsel's failure to

convey the State's offer." J.A. 78. Had Frye pled guilty to a misdemeanor, the Court of Appeals observed, "the trial court would have been bound to accept the guilty plea for the misdemeanor charge." J.A. 77-78. Even if the trial judge had rejected the prosecutor's recommendation of a ninety-day sentence, under Missouri law "[t]he maximum jail sentence that the trial judge could have imposed for the misdemeanor plea was one year imprisonment." J.A. 78. The court thus concluded that Frye had "established prejudice pursuant to Strickland." J.A. 78.

The Court of Appeals then turned to the question of remedy. The court recognized that "the 'appropriate' remediation might be to afford Frye the opportunity to plead guilty to the amended charge of misdemeanor driving while revoked." J.A. 79. In the court's view, however, such a remedy was beyond its authority because "we are not empowered to order the State to reduce the charge against Frye." J.A. 79. Instead, the Court of Appeals reversed the judgment entered on the guilty plea, and remanded the case to the trial court. J.A. 80. The Court of Appeals acknowledged that this remedy "may leave Frye with but two options – proceed to trial or plead guilty to and be resentenced for the same felony charge to which Frye originally entered his 'open' guilty plea." J.A. 79. The court admitted that "this . . . may not seem a satisfactory remedy for Frye." J.A. 79.

SUMMARY OF ARGUMENT

Missouri and the Solicitor General advance a theory of the Sixth Amendment that has been rejected by all twelve federal Courts of Appeals and by the courts of twenty-five of the twenty-seven States in which the issue has arisen. Under this theory, the only cognizable form of prejudice in cases of ineffective assistance of counsel would be the loss of a fair trial. As the lower courts have almost unanimously recognized, this interpretation of the Sixth Amendment has no basis in constitutional text, in precedent, or in common sense.

Strickland v. Washington, 466 U.S. 668 (1984), established the test for claims of ineffective assistance of counsel. The Court applied the *Strickland* standard to the guilty plea in *Hill v. Lockhart*, 474 U.S. 52 (1985), according to the specific circumstances of that particular case then before the Court. Frye's case, while arising out of a guilty plea, presents circumstances that differ from those before the Court in *Hill*, and the *Strickland* standard must be applied in a manner accounting for this particular case. *Hill* did not supplant the *Strickland* standard by establishing a new and absolute rule applicable to every claim of ineffective assistance of counsel following a guilty plea. "Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial." *Strickland*, 466 U.S. at 693. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel." *Id.* at 688-689. Courts must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

See also Roe v. Flores-Ortega, 528 U.S. 470 (2000) (quoting these last two statements from *Strickland*). In determining prejudice from deficient performance, a court "must consider the totality of the evidence before the court or jury." *Strickland*, at 696. *Strickland* established the applicable standard. The specific context of particular cases determines how that standard is applied.

The standard of prejudice established in *Strickland*, appropriately and effectively addresses a defense counsel's deficient performance in failing to communicate a plea offer from the prosecutor to the defendant. Defense counsel has a constitutional obligation to communicate a plea offer. Plea negotiations are a critical stage in the criminal process. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010). A guilty plea entered without knowledge of a prior, and more favorable, plea offer is not entered with full awareness of the alternatives available to the defendant. This lack of awareness undermines the reliability of the plea and renders it fundamentally unfair. A conviction for a felony is a far worse outcome than a conviction for a misdemeanor. Limiting "relief" to standing trial does not remedy the prejudice.

I. *Strickland* established in American jurisprudence the Sixth Amendment's guarantee to effective assistance of counsel in the defense against criminal charges jeopardizing a citizen's liberty. "In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense." Constitution of the United States, Sixth Amendment. "[T]he right to counsel is the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759 (1970). The Sixth Amendment protects a defendant against an attorney's

deficiencies which adversely affect the outcome of the criminal case. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness [and] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668 (1984).

Counsel's performance on Frye's behalf was clearly deficient. Effective counsel's representation must meet an objective standard of reasonableness. *Strickland*, *supra*. "An attorney undoubtedly has a duty to consult with the client regarding important decisions...." *Florida v. Nixon*, 543 U.S. 175, 187 (2004). "A guilty plea, as we recognized in *Boykin v. Alabama*, 395 U.S. 238 (1969), is an event of signal significance in a criminal proceeding." *Id.* (internal citation omitted). Frye's counsel failed to communicate to him the State's offer to amend the charge from a class D felony punishable by up to four years in prison to a misdemeanor with the State's recommendation of ninety-days in jail.

Strickland defined prejudice as "a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceedings would have been different." 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Unaware of an offer by the State to amend the felony charge to a misdemeanor and recommend a sentence of ninety-days in jail, Frye later entered an "open" plea of guilty to the felony offense and received a sentence of three years in prison. Had counsel informed Frye of the

State's plea offer he would have accepted it. It is not only reasonably likely that he would have accepted the offer to reduce the charge and punishment; it is a certainty that he would have done so. And, had the State amended its charge to allege the reduced crime and made a specific sentencing recommendation to the court, it is reasonably probable that the court would have accepted the agreement and imposed sentence accordingly. Even if not, the misdemeanor plea would have protected Frye against anything more than a one-year sentence. But for counsel's unprofessional error, there is a reasonable likelihood that the outcome of the proceedings would have been different. The requirements of *Strickland* have been met.

Hill v. Lockhart held that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." 474 U.S. at 58. Prejudice following a guilty plea "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.*

The Court found in *Hill* that "to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59. This holding followed from the Court's recognition that, "[i]n many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial." *Id.* Examples of this similarity identified by the Court were failure to investigate, failure to discover potentially exculpatory evidence, or failure to advise a defendant of a potential affirmative defense. *Id. Hill* recognized that

under these circumstances, but for counsel's errors, there is a reasonable probability that the defendant would choose to present exculpatory evidence or an affirmative defense through a trial.

Frye's situation is not one of the "many guilty plea cases" addressed by the Court in *Hill*. Frye's case presents a different form of deficient performance and a different prejudice affecting the outcome of the plea process. Had trial counsel performed his responsibilities reasonably, Frye would still not have chosen to go to trial. He would have chosen to accept the plea offer made by the State which would have allowed him to plead guilty before the trial court to a misdemeanor rather than a felony, and his punishment would have been ninety days in jail rather than three years in prison. Counsel's deficient performance clearly resulted in a different outcome of the plea process. Rather than pleading guilty to a misdemeanor with a recommendation from the State for a ninety-day jail sentence, Frye was forced to plead guilty to the original felony charge and throw himself on the mercy of the court regarding sentencing. But for counsel's deficient performance, the outcome of the proceedings, the plea negotiation process, would have been different. This meets the *Strickland* standard for prejudice.

A critical question in reviewing whether a petitioner has demonstrated prejudice resulting from counsel's allegedly deficient performance is whether the decision the petitioner would have made but for the alleged deficiency would have been rational under the circumstances. In the Court's review in *Roe* whether counsel was ineffective in failing to file an appeal on the defendant's behalf, the Court considered whether a rational defendant would want to appeal under the circumstances. 528 U.S. at 480.

In *Padilla*, the Court noted that "to obtain relief on [a claim of ineffective assistance of counsel following a guilty plea] a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." 130 S. Ct. at 1485. By the same token, under the circumstances of Frye's case, it would have been an entirely rational decision to accept an offer from the State to reduce the charge from a felony to a misdemeanor with a sentencing recommendation of ninety-days, and a maximum exposure of one year in jail.

The Courts of Appeals which have confronted circumstances like those in Frye have applied *Hill* in a manner consistent with the *Strickland* standard of deficient performance affecting the outcome of the proceeding. These courts have found prejudice, or accepted that prejudice can be found, where, but for counsel's deficient performance, the defendant *would* have accepted a plea offer and chosen *not* to go to trial. *See Turner v. Tennessee*, 858 F.2d 1201 (6th Cir. 1988) *vacated on other grounds* 492 U.S. 902, *reinstated* 726 F.Supp. 1113 (M.D.Tenn. 1989), *aff'd* 940 F.2d 1000 (6th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992); *Griffin v. United States*, 330 F.3d 733 (6th Cir. 2003); *Williams v. Jones*, 571 F.3d 1086 (10th Cir. 2009) n.3, *cert. denied* 130 S. Ct. 3385 (2010); *United States v. Carter*, 130 F.3d 1432, 1442 (10th Cir. 1997); *Coulter v. Herring*, 60 F.3d 1499 (11th Cir. 1995). These courts recognize that the circumstances causing the prejudice before the Court in *Hill* are not the only circumstances under which prejudice can occur during the plea negotiation process. The general standard of prejudice established in *Strickland* covers all of the possible circumstances of deficient representation that may arise.

Frye's "open" guilty plea did not vitiate the harm from counsel's deficient performance. A guilty plea does not waive a claim that ineffective assistance of counsel rendered the plea unknowing and unintelligent. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). A valid plea must be a "voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Hill*, 474 U.S. at 56. Frye was unaware of the alternative courses of action available to him under the State's plea offer because his attorney failed to inform him of the offer. Constitutional violations are remedied by restoring the victim of the violation to the position they would have been in absent the violation. *Milliken v. Bradley*, 418 U.S. 717, 746 (1974). Every federal Court of Appeal and twenty-five of twenty-seven state courts addressing this issue have rejected the argument that subsequent valid procedures vitiated the harm caused by the constitutional violation of ineffective assistance of counsel because subsequent procedures cannot put the defendant in the position he would have occupied absent the ineffective assistance.

II. The appropriate remedy is to allow Frye to accept the State's plea offer and plead guilty to the court to a misdemeanor, with a recommendation by the State of ninety days in jail. This is the only remedy which returns Frye to the position he was in prior to the ineffective assistance of counsel. The object of the remedy for ineffective assistance is to "identify and neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel." *United States v. Morrison*, 449 U.S. 361, 365 (1981). This principle was established in *Strickland*. 466 U.S. at 692.

This remedy does not put Frye in a better position than he would have occupied absent counsel's ineffectiveness, nor does it create a right to a plea bargain. The State was not required to make a plea offer, but it did. A prosecutor has the power to withdraw a plea offer even after it is accepted, but he did not do so here. The prosecutor recommended as a sentence the first of the two options in his original offer after Frye entered an "open" plea of guilty to the felony. This remedy does not give a defendant any new rights.

This remedy will not contravene the separation of powers. When courts exercise their power to remedy constitutional violations, they have authority to order Executive officials perform actions that would exceed the court's power in the absence of the constitutional violation. Had there been no constitutional violation, a court could not compel a prosecutor to extend a plea offer. But where a constitutional violation prevents a defendant from accepting a plea offer the prosecutor has already made, a court may remedy the violation by ordering the prosecutor's office to comply with the terms of its plea offer. *Puckett v. United States*, 129 S. Ct. 1423, 1430 (2009); *Santobello v. New York*, 404 U.S. 257, 263 (1971). The Sixth Amendment mandates that the State bear the risk of constitutionally deficient counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986).

This remedy will not displace the discretion of the trial court. The trial court will still have the discretion to reject Frye's guilty plea or to sentence Frye to an authorized sentence greater than that recommended by the prosecutor. Frye would have faced this same discretion had counsel been effective in communicating the plea

offer and had Mr. Frye entered a guilty plea according to that offer.

ARGUMENT

I. Galin Frye Was Denied Effective Assistance Of Counsel When His Lawyer Failed to Inform Him of the State's Plea Offer.

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel during plea bargain negotiations. *Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480-1481 (2010). The standard is the familiar one set out in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant establishes ineffective assistance by showing (1) "that counsel's representation fell below an objective standard of reasonableness," *Id.* at 688, and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. *Premo v. Moore*, 131 S. Ct. 733, 737-738, 739-740 (2011); *Wright v. Van Patten*, 552 U.S. 120, 124 (2008); *Hill*, 474 U.S. at 57-58.

Defense counsel's failure to inform Frye of the prosecutor's plea offer unquestionably fell below an objective standard of reasonableness. Had defense counsel acted with reasonable professional competence, Frye would have pleaded guilty to a misdemeanor and received a sentence of as little as ninety days, but certainly no more than one year, in jail. Because of counsel's deficient performance, however, Frye received a sentence of three years in prison on a felony. But for counsel's deficient performance, the result of this proceeding would have been different. *Strickland*, 466 U.S. at 694.

The well-established *Strickland* standard of prejudice appropriately and effectively addresses counsel's deficient performance. Plea negotiations are a critical stage in the criminal process. *Padilla*, 130 S. Ct. at 1486. A guilty plea entered without knowledge of a prior, and more favorable, plea offer is not entered with full awareness of the alternatives available to the defendant. This lack of awareness undermines the reliability of the plea and renders it fundamentally unfair. The different outcome changed the result of the proceedings to Frye's disadvantage. Limiting "relief" to standing trial does not remedy the prejudice.

A. The Right to Effective Assistance of Counsel Ensures the Fairness of All Critical Stages of a Criminal Prosecution, Including Plea Negotiations, Not Just the Fairness of Trial.

The Sixth Amendment guarantees effective assistance of counsel "[i]n all criminal prosecutions," not just at the trial, but before trial and after trial. "[P]erhaps the most critical period of the proceedings ... [is] the time of ... arraignment until the beginning of ...trial." *Powell v. Alabama*, 287 U.S. 45, 57 (1932). The Court noted that at such time "[t]he critical hand of counsel is needed ...." *Id.* at 54-55. The Court has also guaranteed defendants the right to effective assistance of counsel during the sentencing stage of the criminal proceeding, *Rompilla v. Beard*, 545 U.S. 374, 380 (2005), and in the appellate stage following trial. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The Court noted in *Evitts* that counsel's assistance is necessary because an appeal is "an adversary proceeding that – like a trial – is governed by intricate rules that to a layperson would be hopelessly forbidding." *Id.*

Effective assistance of counsel protects the integrity of criminal *prosecutions*, not just criminal *trials*. In *Kimmelman*, the Court stated, "we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent, *or that it attaches only to matters affecting the determination of actual guilt*." 477 U.S. at 380 (emphasis added). So, too, the Third Circuit Court of Appeals held, "the Sixth Amendment right to effective assistance of counsel guarantees more than the Fifth Amendment right to a fair trial." *United States v. Day*, 969 F.2d 39, 45 (3rd Cir. 1992).

Missouri and the Solicitor General rely heavily on the assertion that guilty plea negotiations are not a critical stage of the criminal process. They attempt to distinguish the plea negotiation process from the guilty plea. But the Court has consistently rejected this argument. "[W]e have long recognized that the *negotiation* of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla*, 130 S. Ct. at 1486, *citing McMann v. Richardson*, 397 U.S. 759, 770-771 (1970) (emphasis added). *See also, Burger v. Kemp*, 483 U.S. 776, 803-804 (1987) (noting that "pretrial plea negotiations" are a critical stage of the criminal process). The Court has recognized that the purpose of the Sixth Amendment guarantee of counsel is to assure aid when the accused is confronted with both the intricacies of the law and the advocacy of the public prosecutor. *United States v. Gouveia*, 467 U.S. 180, 189 (1984). This right is extended to critical pre-trial proceedings where the accused is confronted, just as in a trial, by the procedural system, or by an expert adversary in a situation where the results of the confrontation might well settle the accused's fate. *Id.*

The Court recognizes that effective counsel is necessary to provide fairness to the defendant and reliability to the proceeding because the complex nature of criminal law demands an expertise and experience well beyond the un-trained layperson. These complexities are inherent in the process of negotiating a plea agreement. "Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks." *Premo*, 131 S. Ct. at 741 (emphasis added). A layperson defendant "requires the guiding hand of counsel at *every* step in the proceedings against him." *Powell v. Alabama*, 287 U.S. at 53 (emphasis added).

While defense counsel represented Frye during the pre-trial process, his failure to communicate the State's plea offer to Frye is comparable to the absence of counsel during this critical stage. The complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice because "the adversary process itself" has been rendered "presumptively unreliable." *Roe v. Flores-Ortega*, 528 U.S. at 471; *citing United States v. Cronic*, 466 U.S. 648, 659 (1984).

The plea negotiation process is a critical stage of the criminal proceeding involving a confrontation between an expert public prosecutor and an equally expert defense attorney who must protect the defendant's rights throughout the process that settles the defendant's fate in 95 percent of all cases. Without effective assistance of defense counsel, this process breaks down and the validity and reliability of the outcome of the proceeding is called into question.

Missouri and the Solicitor General also make much of the fact that there is no constitutional right to a plea bargain, but that fact has no bearing on this case. Frye is not claiming a constitutional right to plea bargain, nor does granting him relief require the Court to establish such a right. Had the prosecutor not offered a plea bargain, the trial court could not have compelled him to do so. *Mabry v. Johnson*, 467 U.S. 504, 507 (1984); *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). Once plea negotiations begin, however, the defendant has a constitutional right to effective assistance of counsel during the plea negotiation process. That is the right Frye was denied. Missouri's and the Solicitor General's theory was addressed and rejected in *Williams v. Jones*, 571 F.3d 1086 (10th Cir. 2009). In that case, the defendant wanted to accept the state's plea offer of second degree murder with a ten-year prison sentence from the State, but his attorney, believing his client was innocent, told the defendant that pleading guilty would be perjury and if the defendant wanted to plead guilty counsel would withdraw. *Id.* at 1088. The defendant rejected the plea offer, was convicted of first degree murder at trial, and was sentenced to life in prison without parole. *Id.* The defendant sought to set aside his conviction based on ineffective assistance of counsel. *Id.* The State argued on appeal that plea offers are discretionary and the prosecutor was not required to extend one or to keep it open. *Id.* at 1091. The Court of Appeals noted that the case would be different if the prosecutor had not made a plea offer, citing *Mabry v. Johnson*, and *Weatherford v. Bursey*. *Id.* But that was not the issue:

> [W]e are not dealing with the government's discretion to make or withdraw a plea offer. Rather, we are dealing with an offer that

> was rejected because of defense counsel's ineffective assistance, with disastrous results for [the defendant]. In the end, this ineffective assistance and the resulting prejudice are attributable to the State.

Id. at 1091. The Court of Appeals further noted, "No one contests the rule that plea offers are executory in nature and that, under *Mabry* and *Weatherford*, a prosecutor may, consistent with due process, decline to offer or withdraw an offer. But here, the assistant district attorney made an offer that [the defendant] had a right to accept, as long as it was open, with effective assistance of counsel." *Id.* at 1094. The Court of Appeals cited *Hill* and *Strickland*. *Id.*

Missouri suggests that the plea negotiation process is not "confrontational" because:

> Plea offers are often made under circumstances that do not involve the accused in any fashion. For instance, a prosecutor and a defense attorney might run into each other in the hallway of the courthouse or the local restaurant and discuss several offers without ever pausing to allow defense counsel to discuss the various offers with the accused. Such conversations do not subject the defendant to any sort of proceeding or "confrontation" with "prosecutorial forces." There is no danger that the defendant will, because of such a conversation, unwittingly settle his fate or give up the right to trial.

(Petitioner's Brief at 25-26). But that is not what happened in Frye's case. The prosecutor did not "run into" defense

counsel and make an offer in Frye's case in passing. The prosecutor made a formal offer, in writing on his official stationary, setting out the terms of the offer, and setting an expiration date for the offer. J.A. 50. This is at least as common as a meeting in a hallway or a restaurant, and is more likely in more serious cases. Missouri is wrong to discount the seriousness of plea negotiations in general simply because it can envision less formal contacts. Furthermore, it is because plea offers are made to defense counsel rather than to the defendant personally that effective assistance of counsel is required during the plea negotiation process.

Missouri and the Solicitor General narrow the scope of the Sixth Amendment to protecting a trial only, and not the entire criminal process. This narrow focus has been rejected by all twelve Courts of Appeals[1] and twenty-five of twenty-seven states.[2]

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1. *United States v. Rodriguez-Rodriguez*, 929 F.2d 747, 753 (1st Cir. 1991) n.1; *Pham v. United States*, 317 F.3d 178, 182-85 (2nd Cir. 2003); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 438 (3rd Cir. 1982); *United States v. Brannon*, 48 Fed. Appx. 51, 53 (4th Cir. 2002); *United States v. Herrera*, 412 F.3d 577, 579-82 (5th Cir. 2005); *Turner v. Tennessee*, 858 F.2d at 1205; *Julian v. Bartley*, 495 F.3d 487, 498-500 (7th Cir. 2007); *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995); *United States v.Blaylock*, 20 F.3d 1458, 1466 (9th Cir. 1994); *Williams v. Jones*, 571 F.3d at 1091; *Coulter v. Herring*, 60 F.3d 1499, 1502-04 (11th Cir. 1995), *cert. denied*, 516 U.S. 1122 (1996); *United States v. Mouling*, 557 F.3d 658, 669 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 795 (2009).

2. *State v. Donald*, 10 P.3d 1193, 1198-99 (Ariz. Ct. App. 2000), *cert. denied*, 534 U.S. 825 (2001); *In re Alvernaz*, 830 P.2d 747, 753-55 (Cal. 1992); *Carmichael v. People*, 206 P.3d 800, 805-09 (Colo. 2009); *Cottle v. State*, 733 So. 2d 963, 967 (Fla. 1999); *Lloyd v. State*, 373 S.E.2d 1, 3 (Ga. 1988); *People v. Curry*, 687 N.E.2d 877, 887-

B. Failure to Inform the Defendant of a Plea Offer Amounts To Constitutionally Deficient Performance.

No duty is more basic to the role of defense counsel than that of informing the client of a plea offer made by the prosecutor. "An attorney undoubtedly has a duty to consult with the client regarding important decisions," including an offer to plead guilty, which "is an event of signal significance in a criminal proceeding." *Florida v. Nixon*, 543 U.S. 175, 187, (2004) (internal quotation marks omitted). The Court has made it clear that "it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement." *Libretti v. United States*, 516 U.S. 29, 50 (1995).

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88 (Ill. 1997); *Lyles v. State*, 382 N.E.2d 991, 994 (Ind.App.1978); *State v. Kraus*, 397 N.W.2d 671, 674-76 (Iowa 1986); *Osborne v. Commonwealth*, 992 S.W.2d 860, 863 (Ky. Ct. App. 1998); *Williams v. State*, 605 A.2d 103, 109-10 (1992); *Commonwealth v. Mahar*, 809 N.E.2d 989, 993 (Mass.App. 2004); *People v. McCauley*, 782 N.W.2d 520, 523-24 (Mich.App. 2010) (per curiam), appeal pending, 792 N.W. 331 (Mich. 2011); *Dobbins v. State*, 187 S.W.3d 865, 867 (Mo. banc 2006); *Larson v. State*, 766 P.2d 261, 263 (Nev.1988); *State v. Taccetta*, A.2d 884, 887 (N.J.App. Div. 2002); *State v. Simmons*, 309 S.E.2d 493, 498 (N.C.App. 1983); *Jiminez v. State*, 144 P.3d 903, 907 (Okla. Crim. App. 2006); *Commonwealth v. Napper*, 385 A.2d 521, 524 (Pa. 1978); *Davie v. State*, 675 S.E.2d 416, 418, 420-23 (S.C. 2009); *State v. Garrison*, 40 S.W.3d 426, 431 (Tenn. 2000); *Hanzelka v. State*, 682 S.W.2d 385, 387 (Tex. Ct. App. 1984); *In re Plante*, 762 A.2d 873, 876 (Vt. 2000); *State v. James*, 739 P.2d 1161, 1167 (Wash.App. 1987); *Becton v. Hun*, 516 S.E.2d 762, 768 (W.Va. 1999); *State v. Lentowski*, 569 N.W.2d 758, 761 (Wis. Ct. App. 1997). The only States to the contrary are Louisiana and Utah. *State v. Monroe*, 757 So. 2d 895, 898 (La. Ct. App. 2000); *State v. Greuber*, 165 P.3d 1185, 1188-89 (Utah 2007).

Since defense counsel has a constitutional obligation to consult with a client about a plea offer, and the advantages and disadvantages of accepting a plea offer, counsel has the constitutional obligation to inform the defendant that the prosecutor has made a plea offer. Every federal Court of Appeals to have addressed the issue has held that defense counsel's failure to advise a client of a plea offer amounts to constitutionally deficient performance.[3]

The Court has often used the standards of the American Bar Association as guidelines for determining whether counsel's performance is reasonable. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. at 387; *Wiggins v. Smith*, 539 U.S. 510, 525 (2003); *Padilla*, 130 S. Ct. at 1482. The ABA's Model Rules of Professional Conduct require a lawyer "to promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these rules." ABA Model Rule 1.4(a)(1). One such decision is whether to plead guilty. *Id.*, Rule 1.2(a). The Comment to Rule 1.4 makes clear, as the first example of this duty to inform the client, that "a lawyer who receives from opposing counsel . . . a proffered plea bargain in a criminal case must promptly inform the client of its substance." *Id.*, Rule 1.4, Comment 2. The ABA's Standards for Criminal Justice likewise require that

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3. *Rodriguez-Rodriguez*, 929 F.2d at 752; *Pham*, 317 F. 3d at 182; *Caruso* 689 F.2d at 438; *Brannon*, 48 Fed. Appx. at 53; *Arnold v. Thaler*, 630 F.3d 367, 370 (5th Cir. 2011) (per curiam); *Griffin v. United States*, 330 F.3d 733, 737 (6th Cir. 2003); *Johnson v. Duckworth*, 793 F.2d 898, 902 (7th Cir. 1986), *cert. denied*, 479 U.S. 937 (1986); *Blaylock*, 20 F.3d at 1465-66; *United States v. Castro*, 365 Fed. Appx. 966,967 (10th Cir. 2010); *Oliver v. United States*, 292 Fed. Appx. 886, 887 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 2023 (2009); *United States v. Mouling*, 557 F.3d at 669.

"[d]efense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor." ABA Criminal Justice Standard 4-6.2(b).

The Court has stated: "States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented ...." *Roe v. Flores-Ortega*, 528 U.S. at 479. Missouri's Rule 4-1.4 of the rules of professional conduct states: "(a) A lawyer shall: (1) keep the client reasonably informed about the status of the matter; [and] ... (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation." In *In re Crews*, 159 S.W.3d 355, 359 (Mo. banc 2005), the Missouri Supreme Court held that pursuant to Rule 4-1.4, counsel is required to keep the client informed of significant developments in the case, and "a lawyer who receives from opposing counsel ... a proffered plea bargain in a criminal case *must promptly inform the client of its substance.*" (emphasis added).

Trial counsel failed to meet his professional responsibility to inform Frye of the State's plea offer. In failing to do so, his performance fell short of the level of competence required by the Sixth Amendment.

C. Failure to Communicate a Plea Offer Renders a Subsequent Guilty Plea Unknowing, Unintelligent, and Involuntary Because It Leaves the Defendant Unaware of and Unable to Choose Between the Alternatives That Would Have Been Available But for Counsel's Deficient Performance.

While a guilty plea waives some claims of constitutional error occurring prior to the plea, it does not waive a claim of ineffective assistance of counsel relating to "the voluntary and intelligent character of the guilty plea." *Tollett v. Henderson*, 411 U.S. at 267. A valid plea must be a "voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. at 31; *Hill*, 474 U.S. at 56.

The Court noted in *Hill* that "the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" 474 U.S. at 56, *quoting McMann v. Richardson*. Justice Alito noted in his concurring opinion in *Padilla*, that "incompetent advice distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question." 130 S. Ct. at 1493 (J. Alito, concurring). As demonstrated above, failure to communicate a plea offer falls well short of the competence demanded of defense counsel. Counsel is required to advise the defendant of the consequences of accepting a plea offer and pleading guilty. Any increase in a sentence is prejudicial. *Glover v. United States*, 531 U.S. 198, 203 (2001). Voluntariness requires the defendant's awareness of the options available to him. Trial counsel's incompetence in failing to communicate the State's plea

offer to Frye, and failing to advise him of the possibility of a ninety-day sentence on a misdemeanor conviction, rendered involuntary his subsequent "open" plea to a felony with a range of punishment up to four years, and calls the fairness and integrity of the plea itself into question under *Strickland*, *Hill* and *Padilla*.

The approach of Missouri and the Solicitor General unreasonably limits the options available to a defendant: 1) go to trial, or 2) waive a trial and plead guilty. Fundamentally it is true that criminal cases can have only one of three results: dismissal of the charges by the government; a trial; or a guilty plea. But many avenues lead to those destinations. Under Missouri's and the Solicitor General's limited view, the only alternative courses of action open to Frye were to enter an "open" plea of guilty or stand trial. This argument completely ignores that during the critical stage of plea negotiations Frye was offered the options of pleading guilty to a felony with a three year prison term with the possibility of ten days of shock time followed by probation, or pleading guilty to a misdemeanor and serving ninety days in jail. But when Frye entered his guilty plea before the trial court, he was completely unaware that counsel's ineffective delay had forever foreclosed those options. The only reason these options were not "available" when Frye pleaded guilty was that his attorney failed to communicate those options to him. If counsel had acted as a reasonably competent attorney, those would have been the options among which Frye could have chosen when he pleaded guilty.

Missouri and the Solicitor General argue that Frye's guilty plea is valid and reliable because at the guilty plea hearing he acknowledged the rights of trial he was

waiving, the consequences of his plea, and the potential range of punishment. If this is the limit of judicial review, every guilty plea will be found knowing, intelligent and voluntary. This is the same record made in every guilty plea. And, yet, not every guilty plea is found to be knowing, intelligent and voluntary. Guilty pleas are set aside because of what is *missing* from the guilty plea transcript. Missing from Frye's plea colloquy is his unawareness, due to counsel's deficient performance, of the initial plea offer of a misdemeanor and ninety-day jail sentence, an offer he would have accepted had he known about it. The Solicitor General goes even further and argues that Frye's guilty plea was knowing, intelligent and voluntary *precisely because* he was unaware, through counsel's constitutionally deficient performance, of the State's plea offer. Missouri and the Solicitor General are attempting to remove necessary protections of effective assistance of counsel guaranteed by the Sixth Amendment from the United States Constitution.

Missouri further argues that Frye's guilty plea is valid and reliable because he is, in fact, guilty. (Petitioner's Brief at 33). This argument was absolutely rejected when the Court stated in *Kimmelman v. Morrison*, "we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent, or that it attaches only to matters affecting the determination of actual guilt." 477 U.S. at 380.

D. Frye Suffered Prejudice Because Had He Been Informed of the Plea Offer the Outcome Would Have Been Different: He would Have Received a Much Shorter Sentence on a Misdemeanor.

1. Prejudice is Found Where Counsel's Constitutionally Deficient Performance Results in a Different Result to the Criminal Proceeding Including the Plea Negotiation Process.

The second part of the *Strickland* standard requires a showing of prejudice: a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. This measure of prejudice applies to ineffective assistance during plea negotiations, as well as trials. *Padilla*, 130 S. Ct. at 1482; *Hill*, 474 U.S. at 57-59. In *Hill*, the Court stated: "We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Id.* at 58. The prejudice requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* at 59.

But the Court necessarily couched this standard for prejudice in terms of the particular context before it. The Court stated: "[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59. Missouri and the Solicitor General rely heavily on this singular statement without noting its context.

The Court further stated in *Hill* that "[i]n many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through trial." 474 U.S. at 59. The Court provided examples of that trial-based inquiry: where counsel's alleged error is failing to investigate, or failing to discover exculpatory evidence, or failing to advise the defendant of an affirmative defense. *Id.* The remedy for these errors, if established, is to permit the defendant the opportunity to present favorable or exculpatory evidence, or an affirmative defense, at trial.

By using the term "in many guilty plea cases," the Court implicitly recognized that in some cases the inquiry is not the same as trial-based ineffective assistance claims. In those cases, a trial will not remedy the different, and adverse, outcome that results from counsel's constitutionally deficient performance during the plea process.

Reasonable representation by trial counsel in communicating the plea offer would not have provided Frye with exculpatory evidence or a defense at trial. A trial would not have resulted in a misdemeanor conviction. But reasonable performance by trial counsel would have resulted in a different outcome to the plea process – at least two years less incarceration for Frye. Any amount of additional jail time constitutes prejudice under the *Strickland* standard. *Glover, supra* (involving ineffective assistance of counsel during non-capital sentencing).

Hill does not stand for the proposition that there is no remedy for the adverse outcome of the plea process

suffered by Frye; it means that the remedy under the facts of this case is simply not a trial. But there must be a remedy. That remedy is to permit Frye to accept the un-communicated offer and present it to the trial court for acceptance as further discussed below.

Several aspects of *Padilla* offer support for this result. Justice Alito stated that "incompetent advice distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question." 130 S. Ct. 1493 (Alito, J., concurring). Completely failing to advise Frye of the plea offer just as surely distorted his decision-making process and undermined the fairness and integrity of the criminal process. This logic supports the conclusion that trial counsel was constitutionally required to discuss with Frye the options presented in the prosecutor's plea offer; a felony or misdemeanor conviction, and a three-year sentence or a ninety-day sentence. These options had nothing to do with a trial. But their absence most certainly had an effect on the outcome of the plea process.

In *Premo v. Moore*, after Moore pleaded guilty on advice of counsel, he alleged that trial counsel was ineffective in advising him to plead guilty without first moving to suppress his statements to the police. 131 S. Ct. at 738. The state court held that Moore did not receive ineffective assistance of counsel, without specifying whether it was a lack of deficient performance or lack of prejudice. Suppression of the statement to the police would have been essentially meaningless because Moore had made two other statements that would have been admissible at trial. *Id.* at 740. The Court held that the state court could have determined that it was not

reasonably likely that Moore would have rejected the plea offer that avoided a sentence of death or life without parole, and secured the minimum sentence applicable, and that he would have instead insisted on trial. *Id.* at 744. Citing *Hill*, the Court held that to show prejudice, Moore had to demonstrate a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial. *Id.* at 733. Justice Ginsburg said the same in her concurrence, noting that appellate counsel acknowledged that Moore never indicated that he would have rejected the plea and insisted on trial. *Id.* at 746.

The Court's analysis in *Premo*, however, was like the analysis for a trial-based challenge, reviewing an issue involving evidence and considering whether a trial would have remedied the alleged prejudice. This was an inquiry typical of what *Hill* noted is undertaken "in many guilty plea cases." But it does not address the circumstances in other cases like Frye's. While the Court clearly relied on the general *Hill* statement, it did not eliminate the necessity of resorting to the more general standard of *Strickland* in those cases involving a non-trial inquiry.

Furthermore, the Court's prejudice analysis in *Premo* was driven not only by the particular facts of the case which underscored the weak nature of the claim of prejudice, but also by the procedural posture of the case. The Court was reviewing a grant of federal habeas corpus relief from a state conviction. Under the restrictive federal habeas statute, such relief lies only if the state court's decision denying relief "involves 'an unreasonable application' of 'clearly established Federal law, as determined by the Supreme Court.'" 131 S. Ct.

at 737. This is a highly deferential standard, and when combined with the deference given to counsel under *Strickland*, the deference accorded by the Court to the ruling below was doubled. *Id.* at 740. The question under federal habeas review is whether there is any reasonable argument by which the state court could have found that counsel satisfied the *Strickland* and *Hill* standards. *Id.* at 737.

Many of the federal Courts of Appeals apply *Hill* in a manner appropriate to account for the situation presented in this case. These courts have applied the *Hill* measure of prejudice to allegations that, but for counsel's unprofessional errors, the defendant would have *accepted* the plea offer and *not* gone to trial. *See Turner*, 858 F.2d at 1206-1207; *Griffin v. United States*, 330 F.3d at 737 (the second element of the *Strickland* test in the plea offer context is that there is a reasonable probability the petitioner would have pleaded guilty given competent advice); *Williams v. Jones*, 571 F.3d at 1090 (but for counsel's deficient performance, the defendant would have accepted the plea offer and pled guilty); *United States v. Carter*, 130 F.3d at 1442 (as for the prejudice prong, there must be a reasonable probability that, but for incompetent counsel a defendant would have accepted the plea offer); *Coulter v. Herring*, 60 F.3d at 1504 (the defendant must show that there is a reasonable probability that, but for counsel's errors, he would have pleaded guilty and would not have insisted on going to trial). The courts have recognized that the general expression of prejudice in *Hill* does not apply in the other situations that can arise in the plea negotiation process, such as the present case.

2. The Missouri Court of Appeals Employed, and Frye Seeks, the Well-Established *Strickland* Test of Deficient Performance Affecting the Outcome of the Proceedings.

Protecting a defendant's right to effective representation of counsel during the plea negotiation process by requiring counsel to communicate a plea offer does not create a new "results-oriented" test as Missouri argues. Frye did not allege that his trial counsel's performance was deficient because he failed to secure the most advantageous plea possible. He alleged that trial counsel failed to act as a reasonably competent attorney when he failed to communicate the plea offer made by the State. The difference between the sentence offered in the plea bargain – ninety days in jail for a misdemeanor - and the sentence Frye actually received – three years in prison for a felony - is not evidence of counsel's deficient performance; it is evidence of the prejudice Frye suffered as a result of counsel's deficient performance. This is the familiar context-driven *Strickland* test of deficient performance and resulting prejudice. But for counsel's deficient performance, the outcome of the proceedings would have been different. "[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill*, 474 U.S. at 58.

Missouri has set up a straw man to knock down by claiming that Frye and the Missouri Court of Appeals, Western District, have "crafted a test that looks for a 'more favorable' result." (Petitioner's Br. at 29). Missouri then sets out to demonstrate why a "results oriented" test is incorrect. But Missouri's argument is based on a false premise and its argument is irrelevant to this review.

The Missouri Court of Appeals was quite clear that it was applying the analyses for prejudice the Court set out in *Strickland* and *Hill*. The State court began its prejudice analysis by noting: "In *Strickland*, the Supreme Court articulated the standard for prejudice, stating that a defendant must show a reasonable probability that, but for counsel's alleged deficiencies, the result of the proceeding would have been different." J.A. 70. The State court noted that *Strickland's* prejudice prong was interpreted by the Court in *Hill* to mean that in the context of guilty pleas, the defendant must show that but for counsel's errors he would not have pleaded guilty but would have insisted on going to trial. J.A. 70. The State court noted that the justifications given by the *Hill* Court demonstrated that the *Strickland* inquiry for prejudice necessarily depended on the specific evidence and circumstances surrounding the alleged error. J.A. 71. Under the circumstances surrounding the error alleged by Frye, the State court noted that the *Hill* "template" of insisting on a trial "completely ignores *Strickland's* looser emphasis on whether a defendant can establish an 'adverse effect on the defense.'" J.A. 72. The State court concluded that while in many, if not most, cases prejudice will be established by not pleading guilty and insisting on trial, "this is not the only way prejudice can be established." J.A. 72. The State court found prejudice to Frye according to *Strickland's* standard that the outcome of the proceeding would be different. J.A. 72.

Missouri, as does the Solicitor General, relies on *Lockhart v. Fretwell*, 506 U.S. 364 (1993) and *Nix v. Whiteside*, 475 U.S. 157 (1986). These cases discuss the search for reliability and truth through the judicial process, but the circumstances in them are so aberrant that they are simply inapplicable to Frye's case. The

allegation in *Fretwell* was that trial counsel was ineffective in failing to object to certain evidence in aggravation during a capital murder trial. 506 U.S. at 367. At the time of trial, the evidence was inadmissible, but by the time the defendant raised his claim of ineffective assistance of counsel, the case law had changed and the evidence was admissible. Because the sentence was imposed under what was eventually recognized as the correct legal standard, the Court held that the sentence was reliable and the defendant was not prejudiced. *Id.* at 372. The Court noted that had counsel objected, the evidence might have been excluded and the outcome of sentencing might have been different. But since exclusion of the evidence would have been improper as ultimately decided by the courts after trial, the Court held that this "different outcome" would, in fact, have been an unwarranted windfall for the defendant. *Id.* at 369. At the time counsel's effectiveness was being reviewed, the law did not entitle the defendant to exclusion of the evidence. *Id.* But Frye's counsel did not misinterpret any existing law; Frye was entitled to be informed of the plea offer extended by the State but counsel failed to inform him of the offer. Frye is not seeking any windfall; he is seeking only what effective assistance of counsel would have achieved for him.

In *Nix*, the defendant wanted to testify falsely, to commit perjury, during his testimony at trial. 475 U.S. at 161. Defense counsel told him that counsel would have to withdraw if he committed perjury. *Id.* Following his conviction, defendant sought to set aside his conviction because his attorney was ineffective in not allowing him to commit perjury. *Id.* at 162. The Court denied defendant's claim because an attorney does not perform deficiently in refusing to allow his client to commit perjury. *Id.* 166-175.

Counsel's warning that he will withdraw if the defendant commits perjury does not deny the defendant the right to assistance of counsel. *Id.* at 175. The Court also held that the defendant suffered no *Strickland* prejudice because there could be no confidence in a verdict secured through perjured testimony. *Id.* at 998-999. Here, however, Frye had a right to effective assistance of counsel who would advise him of a plea offer extended by the State, and there can be no confidence in a conviction following a guilty plea entered without knowledge of the options the State made available to him. *Padilla*, 130 S. Ct. at 1493 (Alito, J., concurring).

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Court explained the reasons for its holdings in *Fretwell* and *Nix*. The Court noted that it did not modify or supplant the *Strickland* standard in *Fretwell*. *Id.* at 391. The *Strickland* standard provides sufficient guidance for resolving virtually all claims of ineffective assistance of counsel, but in some circumstances, fundamental fairness may affect the analysis. *Id.* Such situations exist where an incorrect interpretation of the law will provide a windfall to the defendant, *Fretwell*, or where false testimony might persuade a jury to acquit a defendant, *Nix*. *Id.* These were results the defendants were not entitled to under the law. The Court made clear that *Fretwell* and *Nix* do not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel *does* deprive the defendant of a substantive or procedural right to which the law entitles him. *Id.* at 393.

The Court again addressed this issue in *Glover*, *supra*. In *Glover*, counsel's unreasonable failure to argue in favor of grouping offenses resulted in an increase in

the defendant's sentence of six to twenty-one months. 531 U.S. at 201. The District Court found this increase insufficiently significant to amount to *Strickland* prejudice. *Id.* at 202. The Court disagreed, holding that the District Court misinterpreted *Fretwell* to mean that only an increase in punishment that rendered the outcome of sentencing unreliable or fundamentally unfair amounted to *Strickland* prejudice. *Id.* at 202-203. The Court noted that it had expressly held in *Williams* that *Fretwell* did not supplant the *Strickland* standard which held that a defendant demonstrates prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 203. The Court reiterated its holding in *Williams* that "in the vast majority of cases ... [t]he determinative question – whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different – remains unchanged." *Id.*

Frye was entitled to effective counsel who would advise him of the State's plea offer. He was entitled to awareness of the alternatives available to him before he decided whether to accept a plea offer and plead guilty. A straightforward application of the *Strickland* test applies because, but for counsel's deficient performance, the outcome of Frye's proceeding would have be different. Frye does not seek to modify or supplant the *Strickland* test.

II. The Appropriate Remedy is to Allow Frye to Plead Guilty to the Original Offer Because That is the Only Remedy That Will Restore Him to the Position He Would Have Occupied Had Counsel Not Been Ineffective.

The ordinary remedy for constitutional violations is to restore the victim of the violation to the position he would have occupied had the violation not occurred. The constitutional violation suffered by Frye was the loss of the opportunity to accept the State's original offer - the State's offer to plead guilty to a misdemeanor with a recommended sentence from the State of ninety-days in jail. The only way to restore Frye to the position he would have occupied had counsel advised him of the plea offer is to allow him to plead guilty under the terms of the plea offer.

Frye's "open" guilty plea to a felony with up to four years in prison could not "remedy" or "cure" the prejudice he suffered from counsel's constitutionally deficient performance. The guilty plea was not constitutionally adequate because it was not knowingly, intelligently and voluntarily entered. Counsel's deficient performance left Frye unaware of the full range of options offered to him by the State. And the resulting sentence of three years in prison cannot cure the prejudice suffered from the loss of the opportunity to obtain a ninety-day sentence for the offense.

Permitting Frye to plead guilty to a misdemeanor with the recommendation of a ninety-day jail sentence will not provide him a windfall he is not entitled to, it does not violate the separation of powers doctrine, it does not

deprive the trial court of its discretion, it does not interfere with finality in criminal proceedings, and it will not lead to "sandbagging" by defense attorneys.

A. The Standard Remedy for Ineffective Assistance, As With All Constitutional Violations, is to Place the Defendant in the Position He Would Have Occupied in the Absence of the Violation.

The remedy for a constitutional violation "must closely fit the constitutional violation." *United States v. Virginia*, 518 U.S. 515, 547 (1996). Constitutional remedies are "necessarily designed, as all remedies are, to restore the victims of [constitutional violations] to the position they would have occupied in the absence of such conduct." *Milliken v. Bradley*, 418 U.S. 717, 746 (1974).

Remedies for deprivation of effective assistance of counsel are no different. "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation." *United States v. Morrison*, 449 U.S. at 364. "Our approach has thus been to identify and neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel." *Id.* at 365. As the Court has observed, "[t]he adequacy of any remedy is determined solely by its ability to mitigate the constitutional error." *Rushen v. Spain*, 464 U.S. 114, 119-120 (1983). An appropriate remedy returns the defendant to the point before the constitutional violation in order to put him in the position he would have occupied but for the error.

Where ineffective assistance of counsel takes place at trial, the appropriate remedy is to remand for a new trial because that is the remedy that "neutralize[s] the taint," *Morrison*, 449 U.S. at 365, and restores the defendant to the position he would have occupied had counsel been effective. *See, e.g., Kimmelman*, 477 U.S. at 372-373.

Where ineffective assistance occurs at some stage other than trial, the Court has always ordered a remedy tailored to cure the violation. Where defense counsel is ineffective at sentencing, the appropriate remedy is to remand for a new sentencing hearing. *Rompilla v. Beard*, 545 U.S. at 393. Where defense counsel is ineffective on appeal, the appropriate remedy is to remand for a new appeal. *Evitts v. Lucey*, 469 U.S. at 390-39. Where counsel's ineffectiveness is a failure to file a timely notice of appeal, the appropriate remedy is to give the defendant a new opportunity to appeal. *Roe v. Flores-Ortega*, 528 U.S. at 484. Where counsel's ineffectiveness consists of a failure to file a timely petition for writ of certiorari, the appropriate remedy is to give the defendant a new opportunity to file a petition. *Wilkins v. United States*, 441 U.S. 468, 470 (1979).

The only remedy appropriate to cure counsel's ineffectiveness in failing to communicate the State's plea offer to Frye is to permit Frye to accept the original offer. Anything less does not "mitigate the constitutional error." *Rushen v. Spain, supra*. Many of the state courts have reached the same conclusion. *See, e.g., Satterlee v. Wolfenbarger*, 453 F.3d 362, 371 (6th Cir. 2006) n.7, *cert. denied*, 549 U.S. 1281 (2007); *Nunes v. Mueller*, 350 F.3d 1045, 1056-57 (9th Cir. 2003); *Blaylock*, 20 F.3d at 1468-69; *United States v. Wilson*, 719 F. Supp. 2d 1260, 1275

(D. Or. 2010); *Leatherman v. Palmer*, 583 F. Supp. 2d 849, 871-72 (W.D. Mich. 2008), *aff'd*, 387 Fed. Appx. 533 (6th Cir. 2010); *Shiwlochan v. Portuondo*, 345 F. Supp. 2d 242, 264-65 (E.D.N.Y. 2004), aff'd, 150 Fed. Appx. 58 (2d Cir. 2005); *Alvernaz v. Ratelle*, 831 F. Supp. 790, 797-99 (S.D. Cal. 1993); *Ebron v. Commissioner of Correction*, 992 A.2d 1200, 1214-19 (Conn.App. 2010), appeal pending, 297 Conn. 915, 995 A.2d 954 (2010); *Jiminez v. State*, 144 P.3d at 905, 907; *Ex Parte Lemke*, 13 S.W.3d 791, 797-98 (Tex. Ct. Crim. App. 2000); *State v. Donald*, 10 P.3d 1193, 1202-05 (Ariz. Ct. App. 2000), *cert. denied*, 534 U.S. 825 42 (2001); *Becton v. Hun*, 205 W. Va. 139, 516 S.E.2d 762, 768 (1999); *Williams v. State*, 605 A.2d 103, 110-11 (Md. 1992); *State v. Kraus*, 397 N.W.2d 671, 676 (Iowa 1986).

B. Constitutionally Adequate Procedures Following Prejudice Suffered By a Defendant From Counsel's Deficient Performance During Plea Bargaining Negotiations Cannot Cure the Resulting Prejudice.

If Frye's guilty plea following the constitutional violation is viewed as a "remedy" or "cure" for the violation, it completely fails to meet the purpose of such a remedy recognized by the Court. *United States v. Virginia*, *supra.*; *Milliken v. Bradley*, *supra.*; *United States v. Morrison*, *supra.*; *Rushen v. Spain*, *supra.*; *Kimmelman v. Morrison*, *supra.*; *Rompilla v. Beard*, *supra.*; *Evitts v. Lucey*, *supra.*; *Roe v. Flores-Ortega*, *supra.*; *Wilkins v. United States*, *supra.* Frye's guilty plea resulting in a three year prison sentence in no way cured or remedied the prejudice he suffered from the constitutional violation that deprived him of a ninety-day jail sentence. The guilty plea to a felony – and resulting three-year prison sentence

– did not put Frye in the position he would have occupied prior to the Sixth Amendment violation – a guilty plea to a misdemeanor with a ninety-day jail sentence.

The Courts of Appeals of the Third, Sixth, Eighth, Ninth and Tenth circuits have expressly addressed, and rejected, the argument that valid, subsequent proceedings can remedy the prejudice caused by counsel's deficient performance during plea negotiations. In *Caruso*, the Third Circuit Court of Appeals held that failure to communicate a plea offer deprives the defendant of the opportunity to present the plea offer to the trial court for acceptance in violation of the Sixth Amendment. 689 F.2d at 438. The State argued that because the defendant received a fair trial after the violation, he was entitled to no other relief. *Id.* The Third Circuit called that argument "untenable," and held "[a] subsequent fair trial does not remedy [the deprivation of the opportunity to plead guilty]." *Id.* That conclusion was re-iterated by the Third Circuit ten years later in *United States v. Day*, 969 F.2d 39, 44 (3rd Cir. 1992). In *Turner*, the Sixth Circuit recognized that the only way to remedy the loss of the opportunity to present a favorable plea offer to the trial court was to provide the defendant the opportunity to do so. 858 F2d at 1207-1208. It noted that "[o]ne more fair trial, or even a series of them, would not necessarily revive the lost chance." *Id.* at 1208. The Sixth Circuit noted that this Court has indicated that specific performance of a plea agreement is constitutionally permissible. *Id.*, *citing Mabry v. Johnson* and *Santobello v. New York*. The Eighth Circuit held in *Engelen v. United States*, while addressing the issue of prejudice resulting from deficiencies during plea negotiations, "that a defendant, after rejecting the proposed plea bargain and receiving a fair trial, may still

show prejudice if the plea bargain agreement would have resulted in a lesser sentence." 68 F.3d at 241. The Ninth Circuit stated in *Blaylock*, "we emphasize that although [defendant] has received a fair trial, he is not precluded from showing prejudice." 20 F.3d 1465. In *Williams v. Jones*, the Tenth Circuit held the defendant established deficient performance and prejudice in counsel's erroneous advice to reject a plea offer, and "[t]he fact that [defendant] subsequently received a fair trial (with a much greater sentence) simply does not vitiate the prejudice from the constitutional violation." 571 F.3d at 1091.

The remainder of the Circuit Courts have found prejudice, or accepted that it could be possible to establish prejudice, from ineffective assistance of counsel during the plea negotiation process, without addressing the validity of subsequent proceedings, and without finding any bar to relief from valid, subsequent proceedings. *See e.g.*, *Rodriguez-Rodriquez*, 929 F.2d 747 (1st Cir. 1991); *Pham*, 317 F.3d 178 (2nd Cir. 2003); *United States v. Brannon*, 48 Fed.Appx. 51 (4th Cir. 2002); *United States v. Herrera*, 412 F.3d 577 (5th Cir. 2005); *Julian v. Bartley*, 495 F.3d 487 (7th Cir. 2007); *Coulter v. Herring*, 60 F.3d 1499 (11th Cir. 1995); and *United States v. Mouling*, 557 F.3d 658 (D.C. Cir. 2009).

The appropriateness of a remedy depends on the specific facts of the particular case. In *Santobello*, the Court remanded the case, stating, "[t]he ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of the case require only specific performance of the agreement on the plea ... or whether, in the view of the state court, the circumstances

require granting the relief sought by petitioner, i.e., the opportunity to withdraw his plea of guilty." 404 U.S. at 263. Justice Douglas noted that the decision of the appropriate remedy was dependent upon the particular circumstances of the case because, "[o]ne alternative may do justice in one case, and the other in a different case." *Id.* at 267. (J. Douglas, concurring). What is appropriate in this case might not be appropriate in every case of ineffective assistance of counsel during plea negotiations. Indeed, there have been cases in which the government urged precisely the remedy Frye urges here. In *United States v. Gordon*, 156 F.3d 376 (2nd Cir. 1998), for example, the defendant demonstrated that his counsel had been ineffective in advising him to decline a plea offer. The United States took the position that the appropriate remedy was a remand for resentencing according to the forgone plea offer. *Id.* at 381. The Court of Appeals held, however, that while a remand for resentencing would have been within the discretion of the District Court, the District Court did not abuse its discretion in deciding instead to vacate the defendant's conviction and grant a new trial. *Id.* at 381-382.

The appropriate remedy in this case is thus not a one-size-fits-all remedy for all cases of ineffective assistance. As Judge Becker of the Third Circuit Court of Appeals noted in *Day*, "a second opportunity to accept a plea agreement ought not be automatic, but it does not follow that the relief of 'specific performance' of a plea bargain is *never* appropriate." 969 F.2d at 47. Judge Winter of the Second Circuit Court of appeals noted in *United States v. Carmichael*, 216 F.3d 224, 227 (2nd Cir. 2000), specific performance will sometimes be the most appropriate remedy, but "we do not mean to suggest ... that a

defendant is necessarily entitled to specific performance of a previously spurned plea offer" in all cases of ineffective assistance. In other cases, there may be different remedies that will be better tailored to restoring the defendant to the position he would have occupied had counsel been effective. In this case, however, a remand to allow Frye to accept the State's plea offer and plead guilty according to its terms is the only remedy that will achieve that end.

C. The Standard Remedy Will Not Give Frye a Windfall, Contravene the Separation of Powers, Displace the Trial Court's Discretion, Cause A Loss of Finality, or Lead to "Sandbagging" by Defense Counsel.

Missouri warns of disastrous consequences if the remedy for the prejudice suffered by Frye is to permit him to accept the offer made by the State and plead guilty before the trial court according to that agreement. None of these consequences are legitimate concerns.

The Court noted in *Fretwell* that "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant a defendant a windfall to which the law does not entitle him." 506 U.S. at 369. But as the Court recognized, counsel's error in failing to object to certain evidence would have provided the defendant a right to something to which he was not entitled because the particular evidence was ultimately found to be admissible. Justice O'Connor wrote separately in concurrence "only to point out that today's decision will, in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland v. Washington*. The determinative question – whether there is 'a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' remains unchanged." 506 U.S. at 373 (internal citations omitted). Here, Frye was entitled to have the State's plea offer made known to him. He was entitled to accept that offer and plead guilty according to its terms to the trial court. He was entitled to a misdemeanor conviction with a ninety-day jail sentence if the plea was accepted by the court. The *Strickland* test for prejudice remains the same. Frye receives a remedy for the prejudice he suffered, not a windfall to which he is not entitled.

Missouri mischaracterizes this remedy as an entitlement to the benefits of the plea offer which would interfere with the authority of a trial court. This is not correct. The trial court retains the authority to reject the plea offer. In this sense, returning Frye to the trial court to accept the offer and enter a plea accordingly does not deprive the trial court of its discretion. But this, too, is the position Frye would have been in but for trial counsel's unprofessional error. The trial court was not required to accept Frye's guilty plea, either according to the original offer made by the State or the "open" plea Frye ultimately entered. However, there is certainly a reasonable probability that the trial court would have accepted Frye's plea to the original offer if the State amended the charge to a misdemeanor and made a recommendation of ninety-days in jail. Missouri has offered nothing to suggest that would not have been the outcome of the plea process had counsel informed Frye of the plea offer. Frye does not have to prove that the outcome would have been different; he is only required to demonstrate a reasonable probability that the outcome would have been different. That is a probability less than

a preponderance, but enough to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

This remedy does not contravene the separation of powers. *See State v. Donald*, 10 P.3d at 1203-1205. Plea bargaining is a function of the executive branch. The trial court could not have compelled the State to engage in plea negotiations or make a plea offer to Frye. *Weatherford*, 429 U.S. at 561; *Mabry*, 467 U.S. at 507. But the State did make a plea offer to Frye. The State was bound by that offer during the terms of the offer.

Where a constitutional violation prevents the defendant from accepting a plea offer made by the prosecutor, a court has authority to remedy that violation by ordering the defendant to be given the opportunity to accept the offer. The Court has held that a trial court may remedy a constitutional violation by ordering a prosecutor's office to comply with the terms of its own plea offer. *Puckett*, 129 S. Ct. at 1430; *Santobello*, 404 U.S. at 263. In *Santobello*, the Court characterized this as "specific performance," and held that while it is not the only remedy, it is a remedy within the power of a court. *Id.*

The logic underlying *Santobello*, *Puckett*, *Mabry*, and *Weatherford* suggests that even if a court would unduly encroach on the prosecutor's authority by ordering the prosecutor to plea bargain or make a plea offer, there is no encroachment where the court orders the prosecutor, as a remedy for a constitutional violation, to abide by an offer already tendered. It must be noted that after the plea offer was not accepted because Frye was unaware of it, the prosecutor's recommendation at the "open" plea was the first option it had offered to Frye in its initial plea offer. J.A. 22, 50.

The remedy fashioned by the Ninth Circuit Court of Appeals in *Nunes v. Mueller*, took into account the discretion of the prosecutor and the issue of ordering specific performance. 350 F.3d at 1056-1057. The Ninth Circuit held that the ineffective assistance of counsel justified dismissal of the charges, and therefore directed the lower court to issue an order dismissing the charges unless the prosecutor extended the original plea offer within a certain period of time. *Id.* In this manner, the court was not interfering with the discretion of the prosecutor, but remedied the harm suffered by the defendant. The Tenth Circuit Court of Appeals noted in *Williams v. Jones*, that "[i]n the end, no remedy may restore completely the parties' original positions," but that the remedy adopted must come the closest to the original positions without being constrained by state law. 571 F.3d at 1093. The Court has noted, "... the Constitution constrains our ability to allocate as we see fit the costs of ineffective assistance. The Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel." *Kimmelman*, 477 U.S. at 379. Allowing Frye to accept the plea offer freely extended by the prosecutor, and not specifically withdrawn, returns the parties, as closely as possible, to their original positions before counsel's deficient performance. If the prosecutor chooses not to extend the original offer, it may have to suffer dismissal of the charges as a remedy for the Sixth Amendment violation.

Granting relief to Frye will not adversely affect the finality of convictions nor open the "floodgates" to additional post-conviction litigation. The Court confronted, and rejected, similar arguments in *Hill* and *Padilla*. This concern is satisfied by the "high bar" of prejudice imposed by *Strickland*. *Hill*, 474 U.S. at 58; *Padilla*, 130 S. Ct. at

1484-1485. The Court stated in *Padilla* that "[t]here is no reason to doubt that lower courts – now quite experienced in applying *Strickland* – can effectively and efficiently use its framework to separate specious claims from those with substantial merit." 130 S. Ct. at 1485. This is even more true under the circumstances of this appeal. While it certainly occurs, the complete failure to communicate a plea offer is an infrequent occurrence. While infrequent, the Sixth Amendment violation involved cries out for relief. Protection of this constitutional guarantee is worthy of an avenue to correct a Sixth Amendment violation.

Missouri's warning of dire consequences if the Court recognizes prejudice in this case is belied by the fact that the Missouri Court that granted relief to Frye merely employed the well-settled *Strickland* prejudice test to this claim of ineffective assistance of counsel during plea negotiations. We have for twenty-seven years been in the middle of whatever "flood" would come from doing so.

Missouri warns that relief to Frye will lead to defense attorneys "sandbagging;" intentionally *not* communicating a plea offer to a defendant in order to "bank" a better outcome for the defendant if the trial turns out poorly. This fear is unfounded because it assumes that criminal defense attorneys, as a group, will intentionally behave unethically. Those individuals who do can be dealt with individually. But refusing to consider Frye's claim for that reason is not justified.

In *Kimmelman*, the Court demonstrated its respect for defense attorneys when it noted, "We have no reason to believe that defense attorneys will 'sandbag' – that is, consciously default or poorly litigate their client's Fourth

Amendment claims in state court in the hope of gaining a more favorable review of these claims in Sixth Amendment federal habeas proceedings. First, it is virtually inconceivable that an attorney would deliberately invite the judgment that his performance was constitutionally deficient in order to win a federal collateral review for his client." 477 U.S. at 382, n.7. In a case more specific to ineffective assistance during the plea negotiation process, the Third Circuit Court of Appeals noted in *Day* that the lower court was concerned about the potential for "sandbagging" by failing to fully discuss a plea offer in order to "ensure, that if convicted, his client can obtain the benefit of such bargain without incurring the obligations invariably associated therewith." 969 F.2d at 46, n.9. The Circuit Court agreed that reviewing courts needed to be wary of such a claim, but stated, "[n]onetheless, we do not think that such concerns justify refusing to consider this sort of claim altogether." *Id.* The Circuit Court showed respect for criminal defense attorneys when it stated, "[m] ost defense lawyers, like most lawyers in other branches of the profession, serve their clients and the judicial system with integrity." *Id.* Deliberate ineffective assistance is unethical, risking disciplinary action, malpractice suits, and a loss of business. *Id.*

Restoring Frye to the position he would have occupied but for counsel's deficient performance comports with the Court's Sixth Amendment precedent. Doing so will not create new rights or a new legal test; nor will it interfere with the orderly administration of justice. Allowing Frye to accept the un-communicated offer will remedy the Sixth Amendment prejudice he suffered, consistent with the standard the Court established in *Strickland v. Washington*.

CONCLUSION

The judgment of the Missouri Court of Appeals, Western District, should be affirmed, insofar as it deemed Galin Frye's guilty plea withdrawn, but it should be modified to allow Frye to accept the State's plea offer of an amendment to a misdemeanor with a recommendation for a ninety-day jail sentence and to plead guilty before the trial court according to those terms of the agreement.

Respectfully submitted,

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REPLY BRIEF

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AND
BRIEFS

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IN THE

Supreme Court of the United States

MISSOURI,
Petitioner,

v.

GALIN E. FRYE,
Respondent.

ON WRIT OF CERTIORARI TO THE
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

REPLY BRIEF

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ARGUMENT

I. The Court should reject Mr. Frye's invitation to depart from the standard established in *Hill v. Lockhart*.

Mr. Frye argues that the standard established in *Hill v. Lockhart*, 474 U.S. 52 (1985), should not apply to his claim because requiring the defendant to prove he "would have insisted on going to trial" is a requirement that should be imposed only when defense counsel has committed a "trial-based" error, *e.g.*, "where counsel's alleged error is failing to investigate, or failing to discover exculpatory evidence, or failing to advise the defendant of an affirmative defense." *See* Resp.Br. 9, 28. He supports this claim by asserting that the standard adopted in *Hill* "followed from the Court's recognition that '[i]n many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through trial.' " Resp.Br. 9.

But Mr. Frye reads *Hill* backwards. In fact, the Court's discussion of what would happen "[i]n many guilty plea cases" followed its determination of the appropriate standard. *Hill*, 474 U.S. at 59. And the standard that the Court adopted followed from the Court's recognition that "[t]he longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " *Id.* at 56. Thus, while the Court discussed how its newly-adopted standard would be applied in the future in "many cases," it did not suggest that in other guilty-plea cases the *Hill* standard could be ignored.

To the contrary, the very facts of *Hill* refute such a notion. Hill alleged that his plea was "involuntary" because "his attorney supplied him with information about parole eligibility that was erroneous." 474 U.S. at 56. This was not a "trial-based" error; yet, the Court applied its newly-adopted standard and held that Hill was required to prove that, but for counsel's alleged error, he would have insisted on going to trial. *Id.* at 60. Thus, while the standard in *Hill* applies to the sorts of so-called "trial-based" errors that will occur in "many cases," it also by its own terms applies to other types of cases, *e.g.*, where counsel has coerced a guilty plea or rendered it unknowing or unintelligent by failing to explain the consequences of the plea. *See Padilla v. Kentucky*, 130 S.Ct. 1473, 1486-87 (2010) (holding that counsel should have advised defendant about deportation consequences that would follow a guilty plea).

Mr. Frye and his *amici* assert that under *Hill* prejudice can be tied to any unfavorable "outcome of the plea process." Resp.Br. 9; NACDL Br. 6; Const. Proj.Br. 12-13; CACL Br. 2, 14-15. But their reliance on one isolated phrase of the Court's opinion is misplaced. For, while the Court observed that the prejudice requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process," *id.* at 59, the Court left no doubt about its meaning. In the immediately following sentence, the Court explained: "*In other words*, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* (emphasis added).

Despite the Court's clear statement of the governing standard, Mr. Frye asserts that tying prejudice to

the "loss of a fair trial" lacks a basis in the Constitution, the Court's precedents, and common sense. Resp.Br. 6. He asserts that the "lower courts have almost unanimously recognized" that the right is not limited to ensuring a fair trial, and, as an example, Mr. Frye cites *United States v. Day*, 969 F.2d 39, 45 (3rd Cir. 1992), for the proposition that "the Sixth Amendment right to effective assistance of counsel guarantees more than the Fifth Amendment right to a fair trial." Resp.Br. 16.

But by requiring the accused to prove that he would have insisted on exercising his right to trial, the Court in *Hill* reaffirmed that the right to the effective assistance of counsel is inexorably tied to protecting the defendant's right to trial. Indeed, the Court has repeatedly recognized that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Strickland v. Washington*, 466 U.S. 648, 658 (1984). And, contrary to the opinion in *Day*, the Court has expressly stated that the right to the effective assistance of counsel does not guarantee more than a fair trial: "Having derived the right to effective representation from the purpose of ensuring a fair trial, we have, logically enough, also derived the limits of that right from that same purpose." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006).

Cases like *Day* fail to abide by this limitation and often find support in precedent that is either inapposite or too old to accurately reflect more recent precedents. In *Day*, for instance, the Third Circuit relied primarily upon *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435 (3rd Cir. 1982)—a case decided two years before *Strickland*. With regard to prejudice specifically, the court in *Day* cited *Caruso*

for the proposition that when counsel fails to communicate a plea offer and a defendant is unable to plead pursuant to the offer, "[a] subsequent fair trial does not remedy this deprivation." *Day*, 969 F.3d at 44. But the only support *Caruso* offered for this critical conclusion was a "*cf.*" citation to *Rose v. Mitchell*, 443 U.S. 545, 557 (1979)—a case where the Court indicated that racial discrimination during grand jury proceedings could not be cured by a subsequent fair trial. Applying *Rose v. Mitchell* to the issue was inapt, and *Day* was decided without the benefit of the Court's opinion in *Gonzalez-Lopez*.

Mr. Frye asserts that a "narrow focus [on the fairness of trial] has been rejected by all twelve Courts of Appeals and twenty-five of twenty-seven states." Resp.Br. 20; *see also* Const.Proj.Br. 14; CACL Br. 21-23. But no collection of lower courts can overrule this Court's precedents, and no collection of opinions can create a constitutional right where none exists. Even when the lower courts are largely unanimous on a given issue, the Court has not refrained from reaching a contrary result. *See Bloate v. United States*, 130 S.Ct. 1345, 1351 (2010) (rejecting majority view in 8-2 federal circuit split); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 169 (1994) (noting that "numerous" federal courts had taken a contrary view); *id.* at 192 (Stevens, J., dissenting) (observing "all 11 Courts of Appeals to have considered the question" had adopted the position rejected by this Court).

Moreover, while many cases state Mr. Frye's position, the lower courts have not uniformly rejected the State's argument. In most of the federal court decisions that Mr. Frye cites, the government did not even argue against the court's reformulation of the prejudice analysis. *See, e.g.*, *Turner v. Tennessee*, 858

F.2d 1201, 1205 (6th Cir. 1988) ("the State does not challenge the proposition that incompetent advice to reject a plea offer can constitute a Sixth Amendment deprivation"). Of the federal cases included in Mr. Frye's footnote 1, only two offered any significant analysis: *Caruso* (which, as discussed above, was not consistent with the Court's more recent precedents), and *Williams v. Jones*, 571 F.3d 1086 (10th Cir. 2009). In *Williams v. Jones*, the court was not unanimous; one judge vigorously dissented on the basis that a lost plea offer could not constitute prejudice, as there was no right to a plea offer. *See id.* at 1097-1108 (Gorsuch, J., dissenting). Finally, not every circuit has unanimously rejected the State's argument: one has expressly agreed with the State's argument. *See United States v. Springs*, 988 F.2d 746, 748-49 (7th Cir. 1993).

In the end, much of Mr. Frye's argument boils down to a claim that he should be able to show *Strickland* prejudice by demonstrating that, but for counsel's error, he probably would have received a shorter sentence. In Mr. Frye's view, the longer sentence he received is inherently prejudicial or unfair. Resp.Br. 24 ("Any increase in a sentence is prejudicial."). *See* NACLD Br. 6-7; Const.Proj.Br. 15; CACL Br. 4-5.[1]

But in a criminal case, in terms of the sentence, there are many possible "fair" results. Given the subjective views and divergent interests of the parties,

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[1] As an alternative, Mr. Frye asserts in passing that he is entitled to a "presumption of prejudice" because counsel's failing to communicate the offer "is comparable to the absence of counsel[.]" Resp.Br. 17. But Mr. Frye is confusing the complete deprivation of counsel with what were merely counsel's ineffectual efforts to contact Mr. Frye.

and given the interests of society (and victims), and given the many ways that a case can evolve over time, no particular sentence or outcome can be reasonably identified as *the* "fair" result. On the other hand, determining whether a trial or a plea hearing was "fair" is something that can be done with a reasonable degree of certainty. Thus, the Court has appropriately concluded that to show prejudice from counsel's alleged errors in a criminal case, a defendant must show the deprivation of some procedural or substantive right. *See Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

Mr. Frye dismisses *Fretwell* as "aberrant" because in that case it was alleged that counsel failed to take advantage of existing case law that was, as it turned out later, wrongly decided. Resp.Br. 33-34. Mr. Frye argues that in *Fretwell*, the law did not "entitle" the defendant to the benefit counsel could have obtained for him. Resp.Br. 34. Of course, Mr. Frye also was not "entitled" to a plea offer (*see* Part III, below); but even if it is assumed, *arguendo*, that counsel's error in this case is not analogous to the error in *Fretwell*, the material aspect of *Fretwell* was its reliance on constitutional principles to reject the notion that the probability of a more favorable outcome, alone, is sufficient to support a claim of *Strickland* prejudice.

It is true that the Court has made plain that *Fretwell* did not create a new test for prejudice. *See Williams v. Taylor*, 529 U.S. 362, 393 (2000). But this merely solidifies the conclusion that *Strickland* was primarily concerned with ensuring the fairness of trial (as opposed to ensuring the best possible result for the defendant). Thus, in *Glover v. United States*, 531 U.S. 198, 202-03 (2001), it was not proper to require anything more than *Strickland*'s analysis, as the alleged error deprived the defendant of a fair

sentencing hearing (*i.e.*, the requisite substantive or procedural right) and a probable lesser sentence.

After a guilty plea, under *Hill*, and consistent with *Fretwell*, the relevant question is not whether the accused received a shorter or longer sentence, but whether the accused was deprived of going to trial altogether, for there is no right—constitutional, statutory, or otherwise—to a plea bargain. *See Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000) ("Like the decision whether to appeal, the decision whether to plead guilty (*i.e.*, waive trial) rested with the defendant and, like this case, counsel's advice in *Hill* might have caused the defendant to forfeit a judicial proceeding *to which he was otherwise entitled*.") (emphasis added).[2]

II. The validity of Mr. Frye's guilty plea was not undermined by counsel's failing to convey the State's plea offer.

Apparently wary of ignoring *Hill* altogether, Mr. Frye's argument hovers between a rejection of the *Hill* standard and an attempt to fit within *Hill*'s admonition that "a defendant who pleads guilty upon

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[2] The CACL argues that a defendant who is deprived of information relevant to a potential guilty plea "has been deprived of his right to exercise authority over fundamental decisions in his defense." CACL Br. 20. And, citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983), the CACL argues that the decision to plead guilty "is a substantive right to which the law entitles him[.]" CACL Br. 20. But this is merely another way of asserting, incorrectly (*see* Part III, below), that Mr. Frye had a right to plead guilty to a particular plea offer. While *Jones v. Barnes* certainly stands for the proposition that only the defendant can make the *decision* to plead guilty, it does not follow that the defendant actually has any *right* to plead guilty. *See Santobello v. New York*, 404 U.S. 257, 262 (1971) ("There is, of course, no absolute right to have a guilty plea accepted.").

the advice of counsel 'may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*[*v. Richardson*, 397 U.S. 759 (1970)].' " *Hill*, 474 U.S. at 56-57. *See* Resp.Br. 10, 24, 27-28. And, citing *North Carolina v. Alford*, Mr. Frye observes that "A valid plea must be a 'voluntary and intelligent choice among the alternative courses of action open to the defendant.' " Resp.Br. 24. *See North Carolina v. Alford*, 400 U.S. 25, 31 (1970) (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *Machibroda v. United States*, 368 U.S. 487, 493 (1962); and *Kercheval v. United States*, 274 U.S. 220, 223 (1927)).

But Mr. Frye is wrong in asserting (Resp.Br. 25) that the "alternative courses of action" should include potential courses of action beyond the two alternative courses implicated by a guilty plea—the alternatives of proceeding to trial or accepting the plea that was actually entered. *Alford* itself reflects that the validity of a guilty plea is evaluated by comparing the alternatives of proceeding to trial or accepting the plea at issue. As the Court explained, when the guilty plea whose validity is at issue is (as in *Alford*) a guilty plea to second-degree murder, the "choice among the alternative courses of action open to the defendant," *Alford*, 400 U.S. at 31, is a "choice between a trial for first-degree murder [without the plea], on the one hand, and a plea of guilty second-degree murder, on the other." *Id.* at 37.

That understanding is confirmed by the three decisions that *Alford* cited to illustrate the standard for determining the validity of a plea. Two focused on the requirement that the defendant understand the consequences of the guilty plea. *See Kercheval*, 274 U.S. at 223; *Machibroda*, 368 U.S. at 493. The third,

Boykin v. Alabama, made clear that the validity of a guilty plea is determined by comparing the alternatives of entering a plea and proceeding to trial. *Boykin* explained that "a plea of guilty . . . is a conviction" based on the defendant's own " 'stipulation that no proof by the prosecution need be advanced' " at trial. 395 U.S. at 242 & n. 4 (citation omitted). Accordingly, the Court reasoned, a guilty plea constitutes a waiver of "[s]everal federal constitutional rights"—the privilege against self-incrimination, the "right to trial by jury" and the "right to confront one's accusers"—that the defendant must have knowingly and intelligently relinquished for his guilty-plea-based " 'waiver to be valid.' " *Id.* at 243 & n.5 (citations omitted). *Boykin* thus requires that courts ensure that defendants have knowingly and intelligently chosen between the alternative courses of (1) proceeding to a trial where the defendant would have enjoyed constitutional trial rights and (2) accepting the guilty plea that would waive those rights.

The Court maintained that standard in *Hill* when it cited the "longstanding test for determining the validity of a guilty plea" and explained that a defendant could "'only attack the voluntary and intelligent character of [his] guilty plea' " by proving ineffective assistance of counsel in "the plea process." *Id.* at 56-57 (citation omitted). And, as stated above, *Hill* then made plain that the relevant measure in examining the "outcome of the plea process" is whether "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. *Hill*'s test, thus, reflects the choice among the two alternative courses of action open to the defendant at the time he enters his guilty plea. It is the entry of that plea that waives the defendant's trial rights, and, as a

result, under *Hill*, that plea cannot later be challenged unless the defendant can show that he would have "insisted on going to trial." *Id.*

Even if it were appropriate to consider what other "alternatives" might have been available under the State's offer, Mr. Frye is forced to speculate when he asserts that, but for counsel's error, the State's offer would have been available to him at the time he pleaded guilty. The State was not bound to hold open the plea offer for any amount of time, and there is no reasonable probability that Mr. Frye would have been able to accept the offer and immediately plead guilty.

The record shows that on November 9, 2007—before the State made its offer—Mr. Frye sought a continuance of his case until January 4, 2008. J.A. 2. It was six days later, on November 15, 2007, that the State made its plea offer. Thus, it is reasonably probable that if Mr. Frye had been inclined to accept the offer, that the parties would have simply agreed to hold the plea hearing on the next court date of January 4, 2008. (Mr. Frye had requested the January date so that he would not have to deal with his criminal case until "past the exam season," J.A. 46; it makes little sense to suggest that he would have immediately pleaded guilty and gone to jail instead of taking exams.) If Mr. Frye did not plead guilty until January 4, 2008, by that time, Mr. Frye had been arrested yet again for driving while revoked. *See* J.A. 43, 45-48. That was the sort of event that would (or at least reasonably could) have prompted the prosecutor to terminate the plea offer. *See* J.A. 45.

III. Mr. Frye's claim that he had a "right" to accept the State's plea offer is inconsistent with *Mabry v. Johnson* and *Weatherford v. Bursey*.

Mr. Frye does not ask the Court to overrule any part of its prior decisions in *Mabry v. Johnson*, 467 U.S. 504 (1984), and *Weatherford v. Bursey*, 429 U.S. 545 (1977); in fact, he cites these cases favorably. He asserts: "Frye is not claiming a constitutional right to plea bargain . . . . Had the prosecutor not offered a plea bargain, the trial court could not have compelled him to do so." Resp.Br. 18. He acknowledges: "The trial court could not have compelled the State to engage in plea negotiations or make a plea offer to Frye." Resp.Br. 46.

But while he cites to *Mabry* and *Weatherford*, Mr. Frye then makes claims that are fundamentally at odds with them. He asserts that because "the State did make a plea offer to Frye," "The State was bound by that offer during the terms of the offer." Resp.Br. 46. He argues that "[h]e was entitled to accept that offer and plead guilty according to its terms to the trial court." Resp.Br. 45. Quoting *Williams v. Jones*, 571 F.3d at 1091, he asserts that the prosecutor "made an offer that [the defendant] had a right to accept, as long as it was open, with effective assistance of counsel." Resp.Br. 18-19.

Both *Mabry* and *Weatherford* make plain that a defendant has no right to plead guilty to a particular offer, that a defendant has no right to plea bargaining, and that a prosecutor is not "bound" by an offer during the terms of the offer. The facts of *Mabry* aptly illustrate these principles. There, the state made an offer of a twenty-one-year sentence to be served concurrently with other sentences the accused

was already serving. *Mabry*, 467 U.S. at 506. The day after the state made its offer, the defendant accepted the offer, but the prosecutor "told counsel that a mistake had been made and withdrew the offer." *Id.* The prosecutor then offered the same twenty-one-year sentence, but with the sentence to run consecutively to the defendant's other sentences. *Id.* The defendant rejected the second offer and trial commenced. *Id.* On the second day of trial, the trial ended in a mistrial. *Id.* The defendant then pleaded guilty according to the terms of the state's second offer involving consecutive time, but the defendant argued that he was entitled to the terms of the first offer that he had accepted. *Id.*

The United States Court of Appeals for the Eighth Circuit agreed and "concluded that 'fairness' precluded the prosecution's withdrawal of a plea proposal once accepted by respondent." *Id.* But this Court disagreed and held that the defendant could not enforce the plea offer that he had tried to accept because "A plea bargain standing alone is without constitutional significance[.]" *Id.* at 507. The Court observed that a plea offer "is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest." *Id.* The same is true in Mr. Frye's case. The State made a plea offer, but the State was not bound by the terms of that offer—even during the allotted time for accepting the offer. A mere offer of prosecutorial grace did not give Mr. Frye any "right" to take advantage of the offer. *See Santobello v. New York*, 404 U.S. 257, 262 (1971) ("There is, of course, no absolute right to have a guilty plea accepted.").

The facts in *Weatherford* also illustrate these principles. There, a "co-defendant" in the defendant's

criminal case was actually an undercover officer. 429 U.S. at 547. Before trial, the undercover officer met with the defendant and the defendant's attorney, and, eventually, the state disclosed the undercover officer's identity and the undercover officer testified at the defendant's trial. *Id.* at 548-549.

In a § 1983 action, the defendant claimed that the state's actions had deprived him of the effective assistance of counsel and due process. The United States Court of Appeals for the Fourth Circuit found that the defendant had been denied due process by the state's concealment of the undercover officer's identity until the day of trial. *Id.* at 550. The Fourth Circuit observed that the state's actions had "lulled [the defendant] into a false sense of security and interfered with his preparations for trial." *Id.* The court of appeals also "suggested that [the undercover officer's] continued duplicity lost [the defendant] the opportunity to plea bargain." *Id.* at 560.

This Court rejected those claims, and with regard to the latter, the Court observed that "there is no constitutional right to plea bargain." *Id.* at 560. Moreover, because the defendant had been given a fair trial, the Court observed that it would be "a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty." *Id.* In Mr. Frye's case, similarly, there was no right to the plea offer, and it cannot be said that a subsequent plea that met constitutional standards infringed Mr. Frye's rights.

IV. Mr. Frye's remedy of specific performance will place defendants in a better position than they would have been in if counsel had communicated the offer.

In Mr. Frye's view, the only result that cures the alleged constitutional violation of losing a plea offer is to order "a remand to allow Frye to accept the State's plea offer and plead guilty according to its terms[.]" Resp.Br. 44. He asserts that he is entitled to that particular result (and not merely the chance to plead guilty again or go to trial) because he proved that there was a "reasonable probability" that he would have obtained that result if counsel had timely communicated the offer. Resp.Br. 45.

There are two fundamental problems with this argument. First, because there was never any agreement between the parties, and because the trial court never accepted the terms of the agreement, there is no agreement to specifically perform. Citing cases like *Puckett v. United States*, 129 S.Ct. 1423, 1430 (2009), and *Santobello v. New York*, 404 U.S. 257, Mr. Frye and his *amici* argue that "The Court has held that a trial court may remedy a constitutional violation by ordering a prosecutor's office to comply with the terms of its own plea offer." Resp.Br. 46; *see* NACDL Br. 10-13; Const.Proj.Br. 27.

But in both *Puckett* and *Santobello*, the parties agreed upon the terms of the respective plea agreements, the defendants actually pleaded guilty in reliance on those terms, and the guilty pleas were accepted by the trial court. *See Puckett*, 129 S.Ct. at 1426-27; *Santobello*, 404 U.S. at 257-60. Accordingly, the Court observed that "plea bargains are essentially contracts" and indicated that one remedy for the government's breach included "specific perform-

ance of the contract." *Puckett*, 129 S.Ct. at 1430. In Mr. Frye's case, of course, the lost plea offer was never agreed to by the parties, and it was never accepted by the trial court. It remained "a mere executory agreement[.]" *Mabry*, 467 U.S. at 507. To suggest that the State should now be bound by those terms (particularly when the position of the parties has materially altered since the time of the offer) is inconsistent with the Court's precedents.

The second problem with Mr. Frye's remedy is that it places him in a better position than he would have been in if counsel had told him about the offer. Mr. Frye is essentially arguing that he should be allowed to plead guilty to the State's offer without allowing the State to exercise its prerogative to withdraw the offer prior to acceptance by the trial court. *See* Resp.Br. 37, 44. But if counsel had timely communicated it, the State could have withdrawn the offer at any time—for example, when Mr. Frye was again arrested for driving while revoked.

Accordingly, even if it is assumed that losing a plea offer is a deprivation that requires a remedy, Mr. Frye should be permitted at most to attempt to negotiate a new plea offer. In other words, ineffective assistance during plea negotiations should only result in another round of plea negotiations, as allowing Mr. Frye to "lock in" the terms of the State's first offer grants Mr. Frye far more negotiating power than he would have otherwise had.

V. Mr. Frye's proposed rule will undermine the widespread and beneficial practice of plea bargaining.

Mr. Frye asserts that "[n]o duty is more basic to the role of defense counsel than that of informing the

client of a plea offer made by the prosecutor." Resp.Br. 21. He cites the American Bar Association's Model Rule 1.4 and the Missouri Supreme Court's Rule 4-1.4, and he points out that these rules of professional conduct require defense attorneys to promptly inform their clients of plea offers and to explain such offers to their clients. Resp.Br. 22-23. The petitioner agrees that, as a practice, prompt communication with the defendant is critical.

Under the Court's precedents, *e.g.*, *Mabry*, it is vitally important that defense attorneys promptly inform their clients of favorable plea offers, as the prosecutor is not bound to hold open any offer for any length of time. In other words, because offers are ephemeral and without constitutional significance, prompt communication is critical, as it increases the likelihood of the defendant's being able to effectuate a favorable outcome by pleading guilty and having the plea agreement embodied in a judgment.

In its opening brief, the State voiced its concern that, if specific performance of an uncommunicated plea offer is deemed the appropriate remedy, "then any offer can be pocketed by defense counsel and held in reserve" to act as a cap on the defendant's criminal liability. Pet.Br. 36. Mr. Frye and his *amici* claim that it is insulting, disrespectful or outrageous to suggest that defense attorneys would ever resort to the unethical practice of withholding a plea offer. Resp.Br. 48; NACDL Br. 3, 19-20; ABA Br. 23. Quoting from the Court's opinion in *Kimmelman v. Morrison*, 477 U.S. 365 (1986), Mr. Frye states that "it is virtually inconceivable that an attorney would deliberately invite the judgment that his performance was constitutionally deficient in order to win a . . . collateral review for his client." Resp.Br. 48-49.

But the State is not suggesting that defense attorneys are a shady class of attorneys who will simply ignore or willfully violate their ethical duties in an attempt to "game" the system. To the contrary, in pointing out that defense attorneys could act in a manner that serves to minimize the loss of liberty for their clients, the State is pointing out that Mr. Frye's rule will bring two ethical principles into conflict.

The preamble to Missouri's Rules of Professional Conduct states: "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." MO. SUP. CT. RULE 4, Preamble ¶ [2]. Usually, the ethical obligations to zealously seek the best possible result and to promptly convey plea offers go hand in hand. But if counsel's silence about an offer will transform the offer into an irrevocable offer, the two ethical obligations begin to conflict. This ethical conflict will sharpen in cases where the criminal charges are more serious and the state makes a favorable offer in the early stages of the case. In short, defense attorneys will in some cases be confronted with the real possibility that withholding a plea offer might be the best means of obtaining the best possible result.

In *Kimmelman* the alleged danger was that defense counsel would "sandbag" by refraining from litigating Fourth Amendment claims, so as to later obtain a new trial for the defendant in federal habeas proceedings. 477 U.S. 382 n. 7. The Court deemed this a negligible danger, for it seemed unlikely that many defense attorneys would give up the chance for acquittal (at a trial where evidence would be suppressed) in exchange for the possibility of obtaining a new trial at some later date. *See id.* But, here, under Mr. Frye's proposed rule, defense counsel's preference for zealously seeking the best possible

outcome will not merely procure a new trial; rather, it will procure the immediate benefit of a reduced sentence and, in some cases, reduced charges. And the defendant will be assured of this benefit even *after* "rolling the dice" at trial in hopes of gaining an acquittal, or after entering an "open" plea in hopes of gaining merciful treatment from the trial court.

Additionally, unlike the dubious, future benefit that might have come from the sort of sandbagging feared in *Kimmelman*, the benefit under Mr. Frye's rule can be realized even before trial. For, once a prosecutor makes any plea offer, defense counsel's silence about the offer will transform the offer into a maximum cap on the defendant's criminal liability. Thus, as trial approaches, if the case takes a turn for the worse, or if the state's subsequent offers are not acceptably favorable, defense counsel need only "come clean" with the defendant and divulge the first plea offer and make its terms immediately available to the defendant (who, like Mr. Frye, will have suffered the same "prejudice" of not being able to previously accept the plea offer that he would have accepted if the defendant had known about it).

In other words, because ethical duties under the rules can conflict, the question of whether counsel's performance was "constitutionally deficient" should not be slavishly tied to one particular rule. The preamble to Missouri's Rules of Professional Conduct acknowledges the possibility of ethical conflicts; it states: "In the nature of law practice, . . . conflicting responsibilities are encountered." MO. SUP. CT. RULE 4, Preamble ¶ [9]. To resolve such conflicts, lawyers in Missouri are advised to consider various principles, including "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law[.]" *Id.*

Mr. Frye essentially argues that counsel's duty to communicate a plea offer is the only permissible course of action under the Constitution. But as the Court made plain in *Strickland*, the rules of professional conduct, while instructive, do not create constitutional rights, and they do not dictate what is required of counsel: "Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, *but they are only guides*." 466 U.S. at 688 (emphasis added). "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688-689. In fact, "Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.*

In short, in the State's view, the problem is not that defense attorneys will willfully abandon their ethical duties, but that defense attorneys will be forced to choose between conflicting obligations. And in some cases, the great benefit that can inure to a criminal defendant who temporarily "loses" a plea offer may be sufficient to convince counsel that silence about an offer is the better choice.

Lastly, the difficulties inherent in Mr. Frye's rule are not limited to instances where defense counsel makes a tactical decision to hold back a plea offer. Even if it is assumed that defense attorneys will, as a practice, always convey plea offers, prosecutors will know that mistakes do happen. Thus, because prosecutors will also know that the State will bear the burden of such mistakes the willingness to plea bargain in the most serious cases will undoubtedly

wane. Plea bargaining will lose its fluidity, it will become much more formal, and it could evolve to the point where the trial court will have to be involved in plea negotiations to ensure that all of the prosecutors' offers have been fully and adequately communicated to defendants.[3] This would place a heavy and unnecessary burden on the criminal justice system.

In short, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation," *Strickland*, 466 U.S. at 689; but if the Court wants to invigorate the professional rules cited by Mr. Frye and the ABA, and if the Court wants to encourage counsel to promptly convey plea offers and provide good advice about such offers, the Court should reject Mr. Frye's proposed remedy and leave the burden of communicating offers on defense counsel.

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[3] In fact, Mr. Frye's *amici* point out that this is already taking place in Arizona, NACDL Br. 20; CACL Br. 25; ABA Br. 24 n. 23, and the CACL urges the Court to encourage states to make all plea offers a matter of record in court. CACL Br. 23-28; *see also* ABA Br. 24.

CONCLUSION

The Court should reverse the judgment of the Missouri Court of Appeals.

Respectfully submitted,

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August 15, 2011

AMICUS CURIAE BRIEF

No. 10-444

In the Supreme Court of the United States

STATE OF MISSOURI, PETITIONER

v.

GALIN E. FRYE

ON WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether defense counsel's failure to convey a prosecutor's guilty-plea offer to respondent deprived respondent of his Sixth Amendment right to the effective assistance of counsel, where respondent later entered an open guilty plea to a felony but asserts that he would have accepted the prosecutor's offer to plead guilty to an uncharged misdemeanor if the offer had been communicated to him.

2. What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures.

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In the Supreme Court of the United States

No. 10-444

STATE OF MISSOURI, PETITIONER

v.

GALIN E. FRYE

ON WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS,
WESTERN DISTRICT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents an asserted Sixth Amendment claim of ineffective assistance of counsel based on counsel's failure to advise respondent of a plea offer extended by the State, after which respondent was convicted on his plea of guilty without a plea agreement. Because a large portion of federal criminal prosecutions are resolved by way of plea agreements, the government has a substantial interest in the resolution of this case.

STATEMENT

1. On August 14, 2007, the State of Missouri filed a criminal complaint charging respondent with one count of driving while his driver's license was revoked (DWR), in violation of Mo. Rev. Stat. § 302.321 (2000). J.A. 11.

Respondent previously had been convicted on at least four separate felony and six separate misdemeanor charges, including at least three misdemeanor DWRs. J.A. 18-19, 34-35. In accordance with state law, the State charged respondent's DWR offense as a Class D felony carrying a four-year maximum term of imprisonment based on respondent's prior DWR convictions. J.A. 11-12; see Mo. Rev. Stat. §§ 302.321.2, 558.011.1(4) (2000 & Supp. 2006).

The public defender's office in Columbia, Missouri, including attorney Michael Coles, represented respondent. J.A. 1, 39-40. In order to schedule respondent's preliminary hearing after respondent's community-college "exam season," J.A. 46; cf. J.A. 21-22, the office sought and obtained a continuance moving that hearing from November 9, 2007, to January 4, 2008. J.A. 1-2, 46.

Meanwhile, on November 15, 2007, the State's attorney wrote respondent's counsel offering two alternative plea agreements. J.A. 50 (letter). First, if respondent agreed to plead guilty to the felony charge, the prosecutor offered to recommend a three-year prison sentence, defer to the court's views regarding probation, but request that ten days be served in jail as "shock" incarceration. J.A. 40-41, 50. Alternatively, the prosecutor indicated that he could bring an "amended misdemeanor" charge for which the prosecutor would recommend a longer, 90-day prison sentence in exchange for respondent's guilty plea. See *ibid.* The prosecutor required a response by December 28, 2007. J.A. 42, 50. Respondent later testified that his trial counsel never communicated this offer to him. J.A. 33-34.

On December 30, 2007, respondent was arrested for committing another DWR offense. See J.A. 47-48, 61. In an internal memo prepared for use at respondent's

January 4 preliminary hearing, respondent's counsel wrote that respondent had acquired a "new misd[emeanor]" case. J.A. 51; see J.A. 43-44, 61.[1] Counsel also knew that the prosecutor here had a practice of "revok[ing]" any outstanding offers "if a new case was charged." J.A. 45.

On January 4, 2008, the criminal proceedings resumed and respondent waived his right to a preliminary hearing. J.A. 2. At his subsequent arraignment, respondent pleaded not guilty. J.A. 5. On March 3, 2008, respondent changed his plea to an "open" guilty plea—*i.e.*, a plea entered without the benefit of a plea agreement—to the Class D felony charged by the State. J.A. 13, 16. In a plea colloquy with the trial court, respondent stated that his guilty plea had not been induced by any promises, threats, or coercion, J.A. 17, and that he understood both that he would relinquish his numerous trial and appeal rights by pleading guilty, J.A. 14-15, and that the court could impose a sentence of up to four years of imprisonment, J.A. 16-17.

On May 5, 2008, the trial court accepted respondent's guilty plea. J.A. 21. The prosecutor recommended a three-year prison sentence, deferred to the court on probation, but asked for ten days of "shock" incarceration in county jail. J.A. 22. After considering a Sentencing Assessment Report (SAR) about respondent's criminal record and other matters pertinent to respondent's sentencing, the court sentenced respondent to three years

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[1] In fact, the State charged respondent with felony (not misdemeanor) DWR for his December 30, 2007 offense. In January 2009, respondent pleaded guilty to that felony charge and was sentenced to three years of imprisonment. See *State* v. *Frye*, No. 0811-CR02644-01 (Mo. Cir. Ct.) (docket available at http://www.courts.mo.gov/casenet).

of imprisonment. J.A. 21, 23; see Mo. Rev. Stat. § 217.760 (Supp. 2006); Mo. Sup. Ct. R. 29.07(a).

2. a. On June 9, 2008, respondent filed a motion for postconviction relief in state court, alleging that his counsel's failure to communicate the State's plea offer to him had violated his Sixth Amendment right to the effective assistance of counsel. J.A. 8; J.A. 25-29 (amended motion).

At an evidentiary hearing, respondent's primary trial counsel (Michael Coles) testified that he had received the State's plea offer but did not recall if he had conveyed it to respondent. J.A. 39. Counsel testified that respondent had been difficult to contact because he lived in another city and had changed his telephone number. J.A. 41. Counsel also stated that he did not recall seeing respondent again until after the State's offer expired, *ibid.*, but admitted that he had an address for respondent. J.A. 44. Respondent, in turn, testified that he had not been told of the State's plea offer until after he had been convicted and sentenced. J.A. 33-34. Respondent asserted without elaboration that, had he known of the offer, he would have agreed to plead guilty to a misdemeanor. J.A. 34.

b. The motion court denied relief. J.A. 52-57. First, the court found that, even if respondent's counsel had failed to inform respondent of the offer, counsel was not at fault because respondent failed to remain in contact with counsel. J.A. 53. Alternatively, the court assumed that counsel's performance was deficient but held that respondent failed to show cognizable prejudice. J.A. 53-57. The court reasoned that the "only way to properly evaluate the alleged ineffectiveness of [respondent's] plea counsel" under the Sixth Amendment is to evaluate the effect of counsel's error on respondent's "waiver of

trial by [a] guilty plea [that was] knowing and voluntary." J.A. 53-55 (quoting *Beach* v. *State*, 220 S.W.3d 360, 364 (Mo. Ct. App. 2007) (applying *Hill* v. *Lockhart*, 474 U.S. 52 (1985))). And because respondent did not claim that he "would have gone to trial [rather than plead guilty] but for his counsel's errors," the court concluded that any alleged error did not violate the Sixth Amendment. J.A. 53, 56.

The motion court explained that a contrary rule would raise two problems. J.A. 55. First, allowing challenges to guilty pleas based on assertedly deficient plea negotiations would significantly undermine the finality of criminal convictions based on such pleas. *Ibid.* Second, no appropriate remedy would be available because the court had "no power to require the State to reinstate the alleged favorable plea offer" and, even if it did, the State could simply "withdraw[] it before it was accepted by the trial court." J.A. 55-56 (citation omitted). Remanding the case for trial likewise would not be an appropriate remedy because respondent had already made the decision to plead guilty to a felony rather than go to trial and did not claim "he would have gone to trial but for his trial counsel's actions." J.A. 57.

3. The Missouri Court of Appeals reversed. J.A. 58-80. The court explained that, under *Strickland* v. *Washington*, 466 U.S. 668 (1984), respondent was required to prove his Sixth Amendment claim by demonstrating that (1) his counsel's performance was deficient and (2) counsel's error prejudiced respondent. J.A. 63. The court concluded that respondent satisfied both criteria.

The court of appeals first held that respondent sufficiently established that counsel's performance was deficient. J.A. 63-70. The court noted, *inter alia*, that respondent's trial counsel never testified that he phoned

respondent about the offer and that the record indicated no effort to mail the offer. J.A. 67-70.

The court of appeals also held that respondent established prejudice under *Strickland* because, it concluded, the result of the proceeding would have been different but for counsel's error. J.A. 70-79. The court recognized that this Court stated in *Hill* that a defendant who has pleaded guilty must demonstrate prejudice under *Strickland* by showing a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." J.A. 70 (quoting *Hill*, 474 U.S. at 59). But the court of appeals concluded that *Hill* did not reflect "the only way prejudice can be established" and did not undermine "*Strickland*'s looser emphasis" on "whether 'the result of the proceeding would have been different,'" J.A. 71-72. See J.A. 71-76. The court thus concluded that respondent's failure to contend that he would have insisted on going to trial was not dispositive. J.A. 73-74, 76.

The court of appeals recognized that a "plea agreement standing alone is without constitutional significance" and that defendants have "no constitutional right to a plea bargain." J.A. 76 (citations omitted). The court also recognized that the State may withdraw its plea offer "without recourse"—even after the defendant has accepted the deal—so long as a court has not yet accepted the resulting guilty plea. J.A. 77. The State here, the court observed, "may well have withdrawn the [o]ffer, even if accepted by [respondent], if it became aware prior to sentencing of [respondent's] new charge on December 30, 2007." J.A. 77 n.4. But the court concluded that respondent had established prejudice because, if his counsel had timely communicated the State's offer, respondent could have "accept[ed] the

[o]ffer and * * * submitted to a guilty plea hearing" on a misdemeanor offense before he received his new DWR charge. J.A. 78 n.6. The sentencing court then "would have been bound to accept the guilty plea for the misdemeanor charge" with a "maximum jail sentence" of one year because "[t]he State ha[s] exclusive control over the charging of [respondent's] offense." J.A. 77-78. Such offers to modify how the State charges an offense, the court of appeals reasoned, were distinct from cases in which the State simply offers a "non-binding sentencing recommendation" in exchange for a guilty plea, because defendants in the latter cases would be "hard pressed to establish prejudice" from offers that would not bind the trial court's sentencing options. J.A. 78 n.5.

The court of appeals therefore "deem[ed] the guilty plea withdrawn" and remanded to allow respondent to decide whether to "insist on a trial" or to "plead guilty to the charged [felony] offense or to such other amended charge as the State may deem it appropriate to offer." J.A. 79-80. The court recognized that this result "may not seem a satisfactory remedy," but it concluded that it was "not empowered to order the State to reduce the charge against [respondent]" to a misdemeanor, and the only other option was to "ignore the merits of [respondent's] claim" by denying relief. J.A. 79.

SUMMARY OF ARGUMENT

Respondent's Sixth Amendment right to the effective assistance of counsel was not violated when his attorney failed to communicate the State's plea offer to respondent. The purpose of the right to counsel is to guarantee criminal defendants the assistance of counsel necessary to justify reliance on the ultimate outcome of the criminal proceeding. Where, as here, a defendant with the

advice of counsel voluntary pleads guilty to the offense charged by the State, and he knowingly and intelligently waives the constitutional rights associated with the criminal trial to which he would have been entitled, the ensuing conviction is a valid and reliable determination of guilt. The Sixth Amendment demands no more.

1. A convicted defendant who claims that he was denied his right to the effective assistance of counsel must establish that (1) counsel's performance was constitutionally "deficient" and that (2) counsel's errors "prejudiced the defense." *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). Such prejudice requires a reasonable probability that counsel's performance affected the outcome. *Ibid.* Not all differences in outcome, however, can constitute cognizable prejudice. Because the touchstone of the inquiry is reliability and fundamental fairness, cognizable prejudice occurs only if counsel's error deprives the defendant of a "substantive or procedural right to which the law entitles him" in his defense. *Lockhart* v. *Fretwell*, 506 U.S. 364, 372 (1993).

a. The failure to communicate a plea offer is not cognizable prejudice under *Strickland* because it does not render the defendant's subsequent conviction or sentence unreliable or deprive the defendant of a right that he would have been entitled to assert in his defense. In this case, respondent was unaware of the prosecution's plea offer until after he had entered his guilty plea. Respondent thus voluntarily, knowingly, and intelligently waived his rights associated with a criminal trial unaffected by knowledge of the offer. The resulting conviction, moreover, is neither unreliable nor fundamentally unfair. No defendant has a constitutional right to a plea bargain: the prosecutor may withdraw an accepted offer and, if not withdrawn, the court may reject it. Counsel's

failure to communicate a plea offer thus will not deprive the defendant of a right to which he was entitled and cannot constitute prejudice under *Strickland*.

b. Moreover, when a defendant who has pleaded guilty seeks to challenge his guilty plea, he must establish that, but for counsel's error, he would have rejected the plea and insisted on trial. *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985). That particular application of *Strickland*'s prejudice standard applies whenever a defendant attempts to overturn his guilty plea. The only way to challenge a guilty plea in this context is to show that the plea is itself invalid, because a valid guilty plea extinguishes all claims of antecedent error by counsel. And to invalidate his own guilty plea, the defendant must show that it was not a voluntary, knowing, and intelligent waiver of the rights that the defendant would have enjoyed had he insisted on a criminal trial. The defendant must therefore show that, but for his counsel's error, he would have chosen trial instead of the guilty plea that supports his conviction. Respondent, who asserts only that he would have pleaded guilty under different terms, does not even seek to make that showing.

2. The absence of any appropriately tailored remedy confirms that the Sixth Amendment is not violated by counsel's failure to communicate a plea offer. The remedy ordered by the Missouri Court of Appeals illustrates the point. The remedy of a new trial will result either in an acquittal (contradicting respondent's claim that he would have pleaded *guilty*) or the same felony conviction that respondent has challenged. Allowing the parties to negotiate a new agreement is equally flawed because it is impossible to restore the *status quo ante*, including the risks and incentives that might have led to a plea bargain. The option of imposing a new judgment that

incorporates the terms of the prosecution's uncommunicated offer entails multiple problems. It overlooks the critical difference between an entitlement and a mere hope or expectation of benefits from a plea agreement; it impermissibly displaces prosecutorial discretion to withdraw or modify the offer; it violates separation-of-powers principles by conferring on courts the Executive's discretion regarding plea bargains and charging decisions; and it displaces the discretion that the trial judge has to accept or reject the agreement and enter an appropriate sentence. In short, the inability to identify any appropriate remedy simply underscores the absence of a constitutional injury in need of remedy.

ARGUMENT

I. DEFENSE COUNSEL'S FAILURE TO COMMUNICATE A PLEA OFFER TO RESPONDENT DID NOT VIOLATE RESPONDENT'S SIXTH AMENDMENT RIGHT TO COUNSEL

A defendant's Sixth Amendment right "to have the Assistance of Counsel for his defence" in a "criminal prosecution[]," U.S. Const. Amend. VI, is not violated when his attorney fails to communicate a prosecutor's guilty plea offer to the defendant. This Court has long held that the right to counsel "exists * * * in order to protect the fundamental right to a fair trial" and that its animating "purpose" therefore is to ensure that the accused "has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland* v. *Washington*, 466 U.S. 668, 684, 691-692 (1984); accord *Mickens* v. *Taylor*, 535 U.S. 162, 166 (2002) (stating that the Sixth Amendment accords the right to counsel "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.") (quoting

United States v. *Cronic*, 466 U.S. 648, 658 (1984)). The right to counsel also applies to "pretrial events that might appropriately be considered to be parts of the trial itself," *United States* v. *Ash*, 413 U.S. 300, 310 (1973), including a defendant's "entry of a guilty plea" in court. *Iowa* v. *Tovar*, 541 U.S. 77, 81 (2004); *id.* at 87 ("A plea hearing qualifies as a 'critical stage'" of the criminal process.).

Because a guilty plea waives the right to trial and other constitutional rights, the plea must be voluntary, knowing, and intelligent. See *United States* v. *Ruiz*, 536 U.S. 622, 628-629 (2002). When a defendant has not waived counsel, the assistance of counsel is a critical ingredient in determining the validity of the plea. *McMann* v. *Richardson*, 397 U.S. 759, 770-771 (1970).

Under *Strickland*, the general test for determining ineffective assistance of counsel requires a showing of deficient performance and prejudice to the defendant. In *Hill* v. *Lockhart*, 474 U.S. 52 (1985), this Court held that *Strickland*'s "prejudice" prong requires the defendant to demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. That standard reflects the underlying constitutional purpose of counsel at a guilty plea: to ensure that a defendant understands his constitutional rights, his options at trial, and the consequences of a conviction. It follows that the one ineffective-assistance claim available to challenge a guilty plea is the claim in *Hill*: but for counsel's errors, the defendant would not have waived trial and pleaded guilty. Respondent cannot satisfy that standard because he entered an open guilty plea and has never contended that, but for his counsel's

error, he "would not have pled guilty and would have insisted on going to trial." J.A. 61, 73-74.

Respondent contends only that his counsel failed to communicate a plea offer from the prosecutor. But respondent's lack of knowledge of that offer did not undermine his comprehension of his rights, his knowledge of his trial option, or the consequences he faced upon conviction. Because counsel's failure to communicate a plea offer has no impact on any of the prerequisites for a valid and reliable determination of guilt through his guilty plea, respondent cannot establish the "prejudice" necessary for ineffective assistance of counsel.

A. Counsel's Failure To Communicate The Prosecutor's Plea Offer To Respondent Did Not Cause Cognizable Sixth Amendment Prejudice Because It Did Not Render Respondent's Conviction Or Sentence Unreliable Or Fundamentally Unfair

A convicted defendant's claim that he was denied the effective assistance of counsel requires proof that (1) counsel's performance was constitutionally "deficient" and that (2) counsel's errors "prejudiced the defense." *Strickland*, 466 U.S. at 687. The error must create a reasonable probability of a different outcome. *Id.* at 694. But because reliability and fundamental fairness serve as the inquiry's touchstone, cognizable prejudice occurs only if counsel's error deprives the defendant of a "substantive or procedural right to which the law entitles him" in his defense. *Lockhart* v. *Fretwell*, 506 U.S. 364, 372 (1993). The failure to communicate a plea offer does not prejudice a defendant under *Strickland* because it does not render the defendant's subsequent conviction or sentence unreliable or deprive the

defendant of a right that he would have been entitled to assert in his defense.[2]

1. Although this Court has extended *Strickland* to ineffective-assistance challenges to guilty pleas, it is useful first to examine the roots of *Strickland* itself. This Court has recognized that the Sixth Amendment right to counsel is a right to the "*effective* assistance of counsel" because the purpose of the Sixth Amendment is to ensure a "fair trial." *Strickland*, 466 U.S. at 684-686 (citation omitted; emphasis added). And because the Court has "derived the right to effective representation from the purpose of ensuring a fair trial," it has "also derived the limits of that right from that same purpose." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 147 (2006). Those limits reflect that the right to effective assistance simply requires "the assistance necessary to justify reliance on the outcome of the proceeding" by ensuring that the defendant is convicted and sentenced in a "trial whose result is reliable." *Strickland*, 466 U.S. at 687, 692.

The Court has "made clear that 'the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . [but] simply to ensure that criminal defendants receive a fair trial.'" *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1403 (2011) (quoting *Strickland*, 466 U.S. at 689). For that reason, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a

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[2] Because the question presented assumes the court of appeals correctly concluded that counsel's conduct was deficient (J.A. 63-70), see Pet. i, this brief assumes *arguendo* that failing to communicate a plea offer is deficient performance under *Strickland*.

just result." *Ibid.* (quoting *Strickland*, 466 U.S. at 686) (emphasis omitted). The "ultimate focus" is "the fundamental fairness of the proceeding whose result is being challenged," which turns on whether "the result of the particular proceeding is [itself] unreliable" because of a "breakdown in the adversarial process." *Strickland*, 466 U.S. at 696.

A defendant asserting an ineffective-assistance claim therefore must establish that counsel's deficient performance "prejudiced the defense" with errors "so serious as to deprive the defendant of a fair trial, a *trial* whose *result is reliable.*" *Strickland*, 466 U.S. at 687 (emphasis added); see *id.* at 694 (the "result of [the] proceeding" must be "unreliable, and hence the proceeding itself unfair"). Although the defendant need not prove by a preponderance of the evidence that counsel's errors "determined the outcome" of his case, he must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Ibid.* In other words, the defendant must establish a "probability sufficient to undermine confidence in the outcome" with errors that "render[] the result unreliable." *Id.* at 687, 694.[3]

Those concerns for reliability and fundamental fairness have equal applicability to ineffective-assistance challenges to guilty pleas. *Hill*, 474 U.S. at 57-58. The failure to communicate a prosecutor's plea offer to the

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[3] This Court has recognized an exception to the normal requirement of actual prejudice by presuming prejudice in contexts that involve the "denial of the assistance of counsel altogether" or involve counsel "burdened by an actual conflict of interest" that affected the lawyer's performance. *Strickland*, 466 U.S. at 692 (discussing *Cronic*, *supra*, and *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980)). That exception does not apply here.

defendant does not render the outcome of the prosecution unreliable. At most, it halts plea negotiations and thereby allows the full criminal process for determining innocence or guilt to run its course. A defendant's subsequent guilty plea may be entirely valid, notwithstanding the absence of information about a prosecutor's earlier plea offer. A plea-based conviction in that setting does not distort the "proper functioning of the adversarial process" in the proceedings, much less suggest that "the result of the particular proceeding is *unreliable* because of a breakdown in the adversarial process." *Strickland*, 466 U.S. at 686, 696 (emphasis added). It therefore cannot establish the type of "prejudice" necessary to establish a *Strickland* violation.

Respondent contends that counsel's failure prejudiced him by denying him "the opportunity to present a plea agreement to the court for acceptance in exchange for a lesser sentence." Br. in Opp. 6. And if he had had that "opportunity," respondent argues, "'the result of the proceeding would have been different.'" *Id.* at 7 (quoting *Strickland*, 466 U.S. at 694). The "prejudice" relevant under *Strickland*, however, is not simply a sufficient likelihood of any "different" result. Cognizable prejudice must reflect that the actual result in a criminal case—here respondent's conviction and sentence based on his open guilty plea—was "unreliable" due to a "breakdown in the adversarial process that our system counts on to produce just results." 466 U.S. at 696. An aborted plea negotiation is irrelevant to that inquiry.

2. This Court's decisions in *Fretwell* and *Nix* v. *Whiteside*, 475 U.S. 157 (1986), confirm that an alleged effect on the outcome is not cognizable prejudice when the challenged attorney deficiency does not undermine the fairness or reliability of the proceeding. In both

cases, the Court held that a showing that the defendant would have secured a more favorable result if his counsel had not been deficient did not demonstrate cognizable prejudice, where the error did not render the proceeding's actual result unfair or unreliable. Those cases demonstrate that respondent's analysis of "prejudice," which "focus[es] solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Fretwell*, 506 U.S. at 369.

In *Fretwell*, the defendant was sentenced to death after a sentencing proceeding in which his counsel failed to raise an objection based on an appellate decision that would have invalidated the only aggravating factor on which the jury based its capital sentence. See 506 U.S. at 366-367. Although the relevant appellate decision had since been overruled, Fretwell argued he was prejudiced by his lawyer's failure to object at sentencing because, at the time, the objection would have invalidated his capital sentence. *Id.* at 368. This Court rejected that contention, even though it accepted that Fretwell had shown that "the outcome would have been different but for counsel's error." *Id.* at 369-370. The "'prejudice' component of the *Strickland* test," the Court reasoned, focuses on whether counsel's deficient performance "renders the result of the trial unreliable or the proceeding fundamentally unfair." *Id.* at 372. Where counsel's error "does not deprive the defendant of any substantive or procedural right to which the law entitles him," the result of those proceedings are neither unreliable nor unfair. *Ibid.*

The Court in *Whiteside* similarly held that Whiteside could not establish cognizable prejudice from his claim that, if defense counsel had allowed him to testify

falsely, "the jury might have believed his perjury" and acquitted him. 475 U.S. at 175-176. *Strickland*'s prejudice prong, the Court explained, required that Whiteside show that his counsel's purportedly deficient performance sufficiently diminished "confidence in the *result* of his trial." *Id.* at 175 (emphasis added). And because Whiteside's "truthful testimony could not have prejudiced the result," the Sixth Amendment was not violated. *Id.* at 175-176; see *id.* at 184, 186-187 (Blackmun, J., concurring) (emphasizing that Whiteside had not established "legally cognizable prejudice" because he "was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial").

This Court has since reiterated its understanding that a "likelihood of a different outcome" will not itself qualify as "legitimate 'prejudice'" because the "prejudice" relevant under *Strickland* requires that "'counsel's deficient performance render[] the result of the trial unreliable or the proceeding fundamentally unfair.'" *Williams* v. *Taylor*, 529 U.S. 362, 392, 393 n.17 (2000) (quoting *Fretwell*, 506 U.S. 372). No separate inquiry into fundamental fairness is required once cognizable *Strickland* prejudice is shown. *Id.* at 393; accord *Glover* v. *United States*, 531 U.S. 198, 204 (2001). But a defendant must establish that counsel's deficient performance deprived him of a "substantive or procedural right to which the law entitles him." *Williams*, 529 U.S. at 393.

The court of appeals emphasized that respondent's three-year sentence was longer than the maximum one-year sentence that might have applied had respondent been told of and accepted the prosecution's offer to allow him to plead guilty to a misdemeanor. But as *Fretwell* illustrates, that bare potential for a better sentence is

insufficient. A plea offer from the prosecution provides the defendant with no substantive or procedural right to which a defendant is entitled, much less one that affects the reliability or fundamental fairness of the subsequent criminal proceedings that independently lead to the defendant's conviction.

"[T]here is no constitutional right to plea bargain." *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1977). Even if a defendant receives and accepts a plea offer from a prosecutor, the resulting "plea bargain standing alone is without constitutional significance." *Mabry* v. *Johnson*, 467 U.S. 504, 507 (1984). The plea bargain "is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest." *Ibid.* The prosecution can therefore withdraw from the deal before a court accepts the defendant's guilty plea and cannot be forced to honor the withdrawn agreement. *Id.* at 505, 510; see *id.* at 511 (explaining that it is irrelevant whether "the prosecutor was negligent or otherwise culpable" in withdrawing a plea offer). The court of appeals thus correctly recognized that a plea offer, even one "accepted by the defendant," can be "withdrawn without recourse" at "any time before it is accepted by the court." J.A. 76-77.[4]

Because an unexecuted plea offer lacks constitutional significance, defense counsel's failure to convey a prosecutor's plea offer to a defendant does not constitute

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[4] The rule is the same in the federal system. See, *e.g.*, *Williams* v. *Jones*, 571 F.3d 1086, 1094 (10th Cir. 2009), cert. denied, 130 S. Ct. 3385 (2010); *United States* v. *Kuchinski*, 469 F.3d 853, 857-858 (9th Cir. 2006); *United States* v. *Springs*, 988 F.2d 746, 749 (7th Cir. 1993); *Government of the Virgin Islands* v. *Scotland*, 614 F.2d 360, 364-365 (3d Cir. 1980).

prejudice under *Strickland*. The lost opportunity to accept a plea bargain does not deprive the defendant of a "substantive or procedural right to which the law entitles him," *Fretwell*, 506 U.S. at 372. And a defendant's guilty plea can be valid without knowledge of the uncommunicated plea offer. See pp. 20-25, *infra*. When a defendant enters such a valid guilty plea, counsel's earlier failure to convey a plea agreement does not undermine the reliability or fairness of the ensuing conviction.

B. A Guilty Plea May Be Collaterally Attacked Only By Showing That The Defendant, But For Counsel's Error, Would Not Have Pleaded Guilty And Would Have Insisted On Going To Trial

Strickland's focus on the reliability and fundamental fairness of the result of a criminal proceeding is embodied in this Court's jurisprudence on ineffective-assistance claims challenging convictions based on guilty pleas. In *Hill*, the Court held that *Strickland*'s "prejudice" prong requires the defendant to demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59. That standard applies whenever a defendant challenges his guilty plea with a *Strickland* claim and reflects the special status of guilty-plea convictions: knowing, voluntary, and intelligent guilty pleas constitute a break in the chain of events and generally extinguish any claims relating to the deprivation of constitutional rights that occurred before the entry of the plea. Because antecedent attorney conduct may not be challenged, the one ineffective-assistance claim available to upset a guilty plea is therefore the claim in *Hill*: but for counsel's errors, the defendant

would not have pleaded guilty. Respondent has never claimed to satisfy that standard. J.A. 61, 73-74.

1. "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Hill*, 474 U.S. at 56 (quoting *North Carolina* v. *Alford*, 400 U.S. 25, 31 (1970)). "That is so because a guilty plea constitutes a waiver of [the] constitutional rights" that the defendant would have enjoyed had he insisted on the alternative of a full criminal trial. *Parke* v. *Raley*, 506 U.S. 20, 29 (1992). And like waivers of constitutional rights generally, a guilty-plea-based waiver of the rights associated with the foregone trial must be voluntary, knowing, and intelligent. See *Ruiz*, 536 U.S. at 628-629; *Brady* v. *United States*, 397 U.S. 742, 748 (1970); cf. Fed. R. Crim. P. 11(b) (specifying federal procedure for accepting guilty pleas).

If the defendant has entered a guilty plea that is voluntary, knowing, and intelligent, it is well established that the plea itself waives claims of antecedent legal error, including constitutional error. A guilty plea is more than "a confession which admits that the accused did various acts," it is an "admission that he committed the crime charged." *United States* v. *Broce*, 488 U.S. 563, 570 (1989) (citations omitted). A guilty plea therefore "represents a break in the chain of events which has preceded it in the criminal process." *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Ibid.*; see also, *e.g.*,

Broce, 488 U.S. at 570; *McMann*, 397 U.S. at 766-768. That holds true even if the defendant was unaware of the earlier constitutional violation when he entered his guilty plea. *Tollett*, 411 U.S. at 265-266. Thus, with one exception not relevant here, a collateral challenge to a guilty plea is "confined to whether the underlying plea was both counseled and voluntary." *Broce*, 488 U.S. at 569.[5] That rule reflects, *inter alia*, a strong structural interest in finality that applies with "special force with respect to convictions based on guilty pleas." *Bousley* v. *United States*, 523 U.S. 614, 621 (1998).

2. *Hill*'s formulation of *Strickland*'s prejudice standard for challenges to guilty pleas is a logical corollary of the guilty-plea waiver rule. *Hill* applies when a defendant has pleaded guilty "upon the advice of counsel" and limits ineffective-assistance claims to those challenging the "voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel" was deficient. *Hill*, 474 U.S. at 56-57 (citing, *e.g.*, *Tollett* and *McMann*). Thus, to overturn the guilty plea, the defendant must show a "reasonable probability that, but for counsel's errors, he would not have pleaded

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[5] This Court has recognized a narrow exception to the general waiver rule for certain constitutional claims alleging that—when "judged on its face—the charge [against the defendant] is one which the State may not constitutionally prosecute." *Broce*, 488 U.S. at 575 (citation and emphasis omitted). Double-jeopardy claims and claims of prosecutorial vindictiveness (alleging that the prosecutor filed a more serious charge because the defendant exercised the right to appeal a conviction on a lesser charge) are exempted because "the constitutional infirmity in the proceedings lay in the State's power to bring any indictment at all" and the relevant claim can be resolved "on the basis of the existing record." *Id.* at 574-575. Ineffective-assistance claims do not fall within this exception.

guilty and would have insisted on going to trial." *Id.* at 59.

Hill focuses on the defendant's hypothetical choice between the guilty plea that the defendant actually entered and trial that the defendant waived because a guilty plea *is* a waiver of trial. As explained above, a guilty plea must encompass a voluntary, knowing, and intelligent "waive[r of the] constitutional rights that inhere in a criminal trial," *i.e.*, the rights that the defendant would have enjoyed *had he insisted on a criminal trial*. See *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004); *Raley*, 506 U.S. at 29. The defendant therefore must show that his waiver of those rights was invalid because, if he had been properly assisted by counsel, he would not have pleaded guilty and would have insisted on exercising his right to trial.

In the context of that choice, defense counsel has the responsibility to "inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forego." *Libretti* v. *United States*, 516 U.S. 29, 50-51 (1995). Counsel must advise the defendant on whether the defendant has a realistic opportunity to avoid conviction on some or all charges by going to trial, including a discussion of legal defenses that could be available, in order to assist the defendant's evaluation of whether a guilty plea is the preferable alternative to a full trial. See *ibid.*; *Hill*, 474 U.S. at 59; *Tollett*, 411 U.S. at 266-268. Cf. *Broce*, 488 U.S. at 573-574 (concluding that a "conscious waiver is [not] necessary with respect to each potential defense relinquished by a plea of guilty"). Counsel must also explain the range of punishments for the charged offense, see *Tollett*, 411 U.S. at 268; see *Hill*, 474 U.S. at 56, and, in some contexts, the

immigration consequences of pleading guilty. See *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1481-1482 (2010) (discussing the "unique nature of deportation" and its "close connection to the criminal process").[5] And counsel must advise the defendant of the rights within the criminal process that the defendant would waive by pleading guilty, including the right to hold the prosecution to its burden of proof. See *Libretti*, 516 U.S. at 50-51; *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969). But if counsel adequately explains the agreement that underlies the plea, as well as the defendant's rights, the consequences of the plea, and its comparative advantages over the option of trial, the guilty plea is effectively counseled and cannot be challenged.

Premo v. *Moore*, 131 S. Ct. 733 (2011), illustrates that *Hill* focuses on a binary choice between the defendant's actual plea and the trial he waived. In *Premo*, the defendant (Moore) confessed to the police and later followed his counsel's advice to accept the State's offer to "plead no contest to felony murder in exchange for [the minimum] sentence." *Id.* at 738. Moore later sought

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[5] In *Padilla*, this Court held that, in certain circumstances, the Sixth Amendment requires defense counsel to advise a criminal defendant whether pleading guilty would carry a risk of deportation. 130 S. Ct. at 1486. Because that advice was relevant to Padilla's decision to plead guilty pursuant to a plea agreement rather than go to trial, cf. *Commonwealth* v. *Padilla*, 253 S.W.3d 482, 483 (Ky. 2008) (noting agreement), the Court had no occasion to analyze whether a defendant could attack his attorney's advice on a guilty plea when his claim was that, but for deficient counseling in or about plea negotiations, he would have pleaded guilty to a different offense or obtained a better sentence. The Court's statement that it has "long recognized that the negotiation of a plea bargain is a critical phase of litigation," 130 S. Ct. at 1486, appears to address the decision to enter a guilty plea based on a negotiated plea bargain rather than go to trial.

postconviction relief on the ground that his lawyer provided ineffective assistance by failing to pursue suppression of Moore's confession before advising him to "accept[] the plea offer." *Ibid.* The Ninth Circuit granted habeas relief. Like the court of appeals in this case (J.A. 71-72), Judge Berzon concluded in her concurring opinion that *Hill* reflects only one alternative way to establish *Strickland* prejudice in "plea bargain cases." *Moore* v. *Czerniak*, 574 F.3d 1092, 1133 (9th Cir. 2009) (concurring opinion), rev'd, 131 S. Ct. 733 (2011). In Judge Berzon's view, *Strickland*'s "ordinary" prejudice standard could be separately satisfied, *ibid.*, by establishing a reasonable possibility that Moore would have "obtained a better plea agreement" from the State if his counsel had first moved to suppress his confession. 131 S. Ct. at 745.

This Court squarely rejected that rationale, holding that "the appropriate standard for prejudice in cases involving plea bargains" was "established in *Hill*." *Premo*, 131 S. Ct. at 745. And because Moore failed to establish that he would have gone to trial but for his counsel's purported error, no relief could be granted. *Ibid.*

3. Any number of actions by defense counsel could potentially affect whether a defendant might obtain a favorable plea agreement with the prosecutor. Those actions may involve litigation tactics (such as suppression motions) aimed at weakening the prosecution's case either to lead the prosecutor to the bargaining table or to secure more "leverage" for "a better plea bargain," *Moore*, 574 F.3d at 1134 (Berzon, J., concurring). The failure to take such actions could arguably be deficient, but after the defendant has entered a guilty plea, the prejudice inquiry necessary to show that his *plea* should

be set aside turns on whether, absent counsel's errors, the defendant would have insisted on his right to a fair trial. Whether earlier errors by counsel—in plea negotiations or otherwise—might have secured a more favorable agreement is irrelevant to that question.

II. THE ABSENCE OF AN APPROPRIATE REMEDY CONFIRMS THAT RESPONDENT DID NOT SUFFER AN INJURY COGNIZABLE UNDER THE SIXTH AMENDMENT

This Court has held that "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Unlike a normal *Strickland* case, this case admits of no appropriate remedy for counsel's failure to communicate the prosecutor's plea offer to respondent. The court of appeals' primary solution does not remedy respondent's claimed harm: a lost opportunity to accept a prosecution plea offer and (perhaps) plead guilty to a misdemeanor DWR charge pursuant to a plea agreement. The court of appeals' suggestion that the parties might decide on their own to negotiate a plea agreement likewise fails to provide an appropriate remedy. Other remedial options adopted in other contexts are equally unsatisfactory. In the end, the unavailability of an appropriately tailored remedy underscores the conclusion that respondent did not suffer a cognizable Sixth Amendment injury.

1. The court of appeals ordered respondent's guilty plea withdrawn and remanded the case to allow respondent to choose between standing trial on the felony DWR charge or entering a guilty plea on that charge without the benefit of a plea agreement. J.A. 79-80. The

court also suggested that the parties might decide to negotiate a plea agreement and that respondent might thereafter enter a guilty plea "to such other amended charge as the State may deem it appropriate to offer." J.A. 79. Neither option provides a remedy appropriately tailored to redress respondent's claimed injury.

a. Respondent pleaded guilty to the State's felony DWR charge. He now argues that, but for his counsel's error, he would have had the opportunity to plead guilty to the same DWR offense charged as a misdemeanor. A remedy that erases *any* finding of guilt cannot logically redress respondent's constitutional claim that he lost an opportunity to *admit* his guilt to a lesser charge. Yet that is precisely the remedy underlying the court of appeals' decision to give respondent the choice between a trial on the State's felony charge and pleading guilty to that charge.

If petitioner chooses a trial, the trial would produce either an acquittal or no remedy at all for respondent's alleged injury. An acquittal would be a windfall entirely untethered from respondent's own claim that he would have pleaded guilty but for his counsel's error. And if respondent were found guilty after trial, there is no reason to think that his sentence would be any lower than the sentence he already received when he *admitted* responsibility with a guilty plea.

The alternative of pleading guilty to a felony without the benefit of a plea agreement is similarly deficient. It simply puts respondent in the position he was in *after* his counsel's error. And, when confronted with the choice between trial and an open guilty plea, respondent pleaded guilty. It would be a waste of judicial resources to give respondent that same choice again.

b. Nor is the court of appeals' remedy warranted to encourage the State to offer respondent a new plea agreement. The fundamental flaw in that approach is that it is impossible to restore the *status quo ante*. The essence of plea bargaining is "mutuality of advantage," *Brady*, 397 U.S. at 752, and vacating respondent's conviction "cannot recreate the balance of risks and incentives on both sides that [previously] existed." *State* v. *Greuber*, 165 P.3d 1185, 1190 (Utah 2007) (quoting *Commonwealth* v. *Mahar*, 809 N.E.2d 989, 1001 (Mass. 2004) (Sosman, J., concurring)).

The decision to enter a plea bargain is normally driven by a number of factors, including (1) the uncertain prospects of a conviction, (2) the unknown severity of the criminal sentence, (3) the costs associated with trial, and (4) other promises that might be made in an agreement. New negotiations would unfairly provide the defendant with the advantages of time: important witnesses die, disappear, or become unavailable, or their memories fade. See *Premo*, 131 S. Ct. at 745-746. The risk of acquittal, moreover, is a key element in the State's plea-bargaining calculus and, to preserve the State's incentive to avoid that risk, a court must allow the possibility for acquittal, even though doing so risks the very windfall discussed above.

Other distortions in the parties' plea-bargaining incentives are often equally significant. After a defendant has pleaded guilty and been sentenced, the parties acquire important insight into the severity of the sentence that would result if they were to negotiate a new plea. For instance, the prosecutor's original plea offer here suggested the alternatives of (1) a felony plea for which the State would recommend a three-year term of imprisonment, defer to the court on probation, and request

AMICUS CURIAE BRIEF

Nos. 10-209 and 10-444

In the Supreme Court of the United States

BLAINE LAFLER,

Petitioner,

v.

ANTHONY COOPER,

Respondent.

STATE OF MISSOURI,

Petitioner,

v.

GALIN EDWARD FRYE,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit and to the Court of Appeals of Missouri (Western District)

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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July 22, 2011

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QUESTIONS PRESENTED

1. Where defense counsel's deficient performance causes the defendant to lose the benefit of a favorable plea agreement that the defendant would have accepted had he been competently advised, has the defendant been deprived of the effective assistance of counsel guaranteed by the Sixth Amendment?

2. What remedy, if any, should be provided for ineffective assistance of counsel during plea negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

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INTEREST OF THE ABA AS *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of Respondents. The ABA requests that the Court consider the consensus views embodied in the ABA ethical rules and criminal justice standards in deciding whether a criminal defendant is entitled to a remedy where his lawyer's constitutionally deficient performance causes him to lose the benefit of a favorable plea proposal.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members span all 50 states and other jurisdictions, and include attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutor and public defender offices, as well as judges, legislators, law professors, and law students.[2]

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in the preparation of this brief, or in the adoption or endorsement of the positions in this brief.

Since its inception, and as one of the cornerstones of its mission, the ABA has actively sought to improve the quality of American legal services by "[p]romot[ing] competence, ethical conduct and professionalism."[3] One of these efforts is the development and adoption of professional standards to serve as models for the regulation of lawyers by the individual states. Its first standards, the CANONS OF PROFESSIONAL ETHICS, were adopted in 1908, and have been continuously amended and updated over the years. They are now published as the ABA MODEL RULES OF PROFESSIONAL CONDUCT.[4]

Another of these efforts has been the development of the ABA STANDARDS FOR CRIMINAL JUSTICE. Begun in 1964 under the aegis of then-ABA President (and later Justice) Lewis Powell, and refined over the last forty years, the Standards represent a considered collection of "best practices" based on the consensus views of a broad array of professionals involved in the

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[3] ABA Mission and Association Goals, *available at* http://www.abanet.org/about/goals.html.

[4] The ABA MODEL RULES OF PROFESSIONAL CONDUCT are developed through the efforts of ABA members and national, state and local bar organizations, and are subjected to review by academicians, practicing lawyers and the judiciary. Before they become official ABA policy they must be approved by vote of the ABA House of Delegates (HOD), which is composed of more than 500 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. Information on the HOD is available at http://www.americanbar.org/groups/leadership/house_of_delegates.html.

criminal justice system.[5] The Standards do not purport to establish the constitutional baseline for effective assistance of counsel. *See Rompilla v. Beard*, 545 U.S. 374, 399 (2005) (Kennedy, J., dissenting). They have, however, been recognized by this Court as "valuable measures of the prevailing professional norms of effective representation." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010); *see also Strickland v. Washington*, 466 U.S. 668, 688 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what [performance of counsel] is reasonable."). As relevant to the cases before the Court, the Standards require criminal defense counsel to promptly communicate any plea offer to the client, and to provide the full and accurate advice necessary to permit the client to make an informed decision regarding any plea offer. The Standards also provide that, on finding that a defendant lost the benefit of an advantageous plea offer because of constitutionally ineffective assistance of counsel, the court should have broad discretion in fashioning a remedy that will place the defendant insofar as possible in the position he or

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[5] The ABA CRIMINAL JUSTICE STANDARDS are developed through the work of broadly representative task forces made up of prosecutors, judges, defense lawyers, academics, the public and other groups that may have a special interest in the subject, as well as by the diverse membership of the ABA. They, too, must be approved by vote of the ABA HOD before they become official ABA policy. A complete set of the Standards, which are divided into volumes by topical area, and a history of their development, are available at http://www.americanbar.org/groups/criminal_justice/policy/standards.html; *see also* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 14-15 (Winter 2009) (describing the process by which the Standards are developed and promulgated).

she would have been in had the constitutional violation not occurred.

SUMMARY OF ARGUMENT

This Court has recognized that American Bar Association standards are valuable measures of prevailing professional norms of effective representation for purposes of the Sixth Amendment. A lawyer's duties under the ABA ethical standards include providing competent representation to a client and communicating with the client concerning matters of significance to the client. These duties are particularly important when a criminal defendant is considering entering into an agreement to plead guilty. As elaborated in the ABA criminal justice standards, the lawyer's duties at the plea stage include promptly informing the client of all significant plea proposals made by the prosecutor, and fully explaining the choices available to the client after conducting an investigation and analysis of all pertinent issues of fact and law. When defense counsel fails to convey a plea offer to the client, or gives the client considering a guilty plea materially inaccurate advice about the charges and the burden of proof, defense counsel's performance falls below the established standard of reasonableness.

Where the accused has been denied the effective assistance of counsel because of deficient representation in the plea process, a subsequent fair trial does not remedy the initial constitutional error. In those rare cases where a defendant loses the benefit of an advantageous plea because of constitutionally ineffective counsel, the court should have discretion to fashion a remedy that will place the defendant insofar

as possible in the position he or she would have been in had the right to effective assistance not been violated. The fact that nearly 95% of criminal convictions now result from guilty pleas makes it all the more important that defendants considering a guilty plea should have competent counsel. In some cases, the circumstances will dictate that the appropriate remedy for a constitutional violation is to vacate the conviction and allow the government to re-prosecute the case. In this event, the government may choose to reopen plea negotiations. In other cases, including where re-prosecution is not feasible, the appropriate remedy may be to afford the defendant the benefit of the offer lost through constitutionally deficient counsel.

ARGUMENT

I. PLEA NEGOTIATIONS ARE A CRITICAL STAGE OF THE CRIMINAL PROCESS IN WHICH A DEFENDANT MUST HAVE COMPETENT COUNSEL.

A. ABA Standards Emphasize the Importance of Competent Counsel at the Plea Stage.

A lawyer's duty to represent a client competently in the pretrial stages of a criminal case, including in plea negotiations, is recognized in the ABA MODEL RULES OF PROFESSIONAL CONDUCT ("Model Rules" or "R.") and elaborated in the ABA STANDARDS FOR CRIMINAL JUSTICE. Under the Model Rules – and as this Court has long recognized, *see, e.g., Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966) – the decision to plead guilty is considered so vital that it is specifically identified as one of the very few that cannot be made by the lawyer

alone. *See* R. 1.2(a) (a lawyer "must abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify"); *see also* R. 1.4(a)(1) (a lawyer must "promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these rules");[6] R 1.4(b) (a lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions"); *accord* Standard 4-5.2(a) of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION (3d ed. 1993) (hereinafter "Defense Function Standards")[7] (the decision whether to plead and what plea agreement to accept are "ultimately for the accused . . . after full consultation with counsel.").[8] Model Rule 1.2(a) and Defense Function Standard 4-5.2(a) give effect to an accused individual's right to make decisions regarding matters that are "fundamental" or "substantive" because they are highly personal and derive from constitutional guarantees. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (decisions about fundamental

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[6] The first example in the commentary to Rule 1.4 of this duty to inform the client is that "a lawyer who receives from opposing counsel . . . a proffered plea bargain in a criminal case must promptly inform the client of its substance." R. 1.4, cmt. 2.

[7] Of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION, only the Defense Function Standards are discussed in this brief.

[8] The commentary to Defense Function Standard 4-5.2 explains that "because of the fundamental nature of decisions such as these, so crucial to the accused's fate, the accused must make the decisions himself or herself."

matters, including decision to plead guilty, are reserved for the defendant).

Defense counsel's failure to communicate a plea offer, and to fully and accurately explain the choices facing the client at this critical stage of the case, effectively deprives the client of the right to knowingly and intelligently make a decision that will predictably have a dramatic effect on his or her future. *See* Standard 14-3.2(a) of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY (3d. ed. 1999) (hereinafter "Pleas of Guilty Standards") (defense counsel "should keep the defendant advised of developments arising out of plea discussions conducted with the prosecuting attorney, and should promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney"); *see also* Defense Function Standard 4-6.2(b) (counsel should "promptly communicate and explain to the accused all significant plea proposals made by the prosecutor").[9] The ABA Criminal Justice Standards have contained

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[9] The commentary to Defense Function Standard 4-6.2 explains that:

> Because plea discussions are usually held without the accused being present, the lawyer has the duty to communicate fully to the client the substance of the discussions. It is important that the accused be informed of proposals made by the prosecutor; the accused, not the lawyer, has the right to decide on prosecution proposals, even when a proposal is one that the lawyer would not approve. If the accused's choice on the question of a guilty plea is to be an informed one, the accused must act with full awareness of the alternatives, including any that arise from proposals made by the prosecutor.

Defense Function Standard 4-6.2(b) cmt.

these requirements for more than thirty years,[10] and they have been cited by numerous courts both before and after *Strickland* as establishing the norm of effective representation in the guilty plea context.[11]

ABA standards also require that a lawyer must fully explain and advise about the choices available to the client considering a plea offer, after conducting an appropriate investigation and analysis of all pertinent

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[10] *See* Standard 4-6.2(a) of the ABA STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION (2d ed. 1979); *see also* Standards 14-3.2(a) and (b) of the ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY (2d ed. 1979). The ethical duty to convey and advise about a plea offer was also contained in the 1969 MODEL CODE OF PROFESSIONAL RESPONSIBILITY that antedated the Model Rules. *See, e.g.*, Ethical Consideration 7-7 ("A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken"); *see also State v. James*, 739 P.2d 1161, 1166-67 (Wash. Ct. App. 1987); *Hanzelka v. State*, 682 S.W.2d 385, 387 (Tex. Ct. App. 1984).

[11] *See, e.g., Davie v. State*, 675 S.E.2d 416, 420 (S.C. 2009); *Jiminez v. State*, 144 P.3d 903, 906 (Okla. Crim. App. 2006); *People v. Perry*, 68 P.3d 472, 477 (Colo. Ct. App. 2002); *State v. Donald*, 10 P.3d 1193, 1198 (Ariz. Ct. App. 2000); *Cottle v. State*, 733 So. 2d 963, 964-65 (Fla. 1999); *Becton v. Hun*, 516 S.E.2d 762, 766 (W. Va. 1999); *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994); *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994); *People v. Alexander*, 518 N.Y.S.2d 872, 879 (N.Y. Sup. Ct. 1987); *Lloyd v. State*, 373 S.E.2d 1, 2-3 (Ga. 1988); *James*, 739 P.2d at 1166-67; *Johnson v. Duckworth*, 793 F.2d 898, 901-902 (7th Cir. 1986); *Hanzelka*, 682 S.W.2d at 387; *State v. Simmons*, 309 S.E.2d 493, 497 (N.C. Ct. App. 1983); *People v. Ferguson*, 413 N.E.2d 135, 138 (Ill. App. Ct. 1980); *Lyles v. State*, 382 N.E.2d 991, 993-94 (Ind. Ct. App. 1978).

issues of fact and law. Pleas of Guilty Standard 14-3.2(b) provides that "to aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and considerations deemed important by defense counsel or the defendant in reaching a decision." The commentary to this Standard explains that "[t]his is a critical standard because the system relies, at heart, on defense counsel to ensure that a defendant's guilty plea is truly knowing and voluntary and is entered in his or her best interests." *See also* commentary to Defense Function Standard 4-6.1(b) ("Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including analysis of controlling law and the evidence likely to be introduced at trial."). The commentary to Pleas of Guilty Standard 14-3.2 contrasts defense counsel's advisory role with that of the court:

> Although the court must inquire into the defendant's understanding of the possible consequences at the time the plea is received . . ., this inquiry is not, of course, any substitute for advice by counsel. The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations that may not be covered by the judge in his or her admonition. A defendant needs to know, for

> example, the probability of conviction in the event of trial.

Pleas of Guilty Standard 14-3.2 cmt. The Pleas of Guilty Standards also caution the court not to accept a plea "where it appears the defendant has not had the effective assistance of counsel." *See* Pleas of Guilty Standard 14-1.4(d).[12] All of the Standards discussed above were in effect and reflected well-established norms many years before the defense attorneys' actions in these cases. *Compare Bobby v. Van Hook*, 130 S. Ct. 13, 16-17 (2009) (per curiam).[13]

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[12] The commentary to Pleas of Guilty Standard 14-1.4 notes that a similar provision was contained in the UNIFORM RULES OF CRIMINAL PROCEDURE, promulgated in 1987. *See* UNIF. R. CRIM. P. 444(b)(2) (1987) (a court "may not accept the plea if it appears that the defendant has not had the effective assistance of counsel.").

[13] In *Bobby*, in considering whether counsel's performance fell "below an objective standard of reasonableness" in light of "prevailing professional norms," the Court distinguished the detailed 2003 ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES ("2003 ABA Guidelines"), promulgated in 2003 long after the defendant's trial, from the more general ABA standard in effect in 1985. *See* 130 S. Ct. at 17 (quoting from the ABA STANDARDS FOR THE DEFENSE FUNCTION (2d ed. 1979)). The Court criticized the court of appeals for interpreting the 2003 ABA Guidelines as "inexorable commands," as opposed to "'only guides' to what reasonableness means," *id.*, and reserved the possibility that it might "accept the legitimacy" of a less detailed set of guidelines that did not "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.* at 17 n.1. As argued *infra*, the specific ways in which counsel's performance in these

B. This Court's Recent Sixth Amendment Jurisprudence Recognizes the Importance of Competent Counsel at the Plea Stage.

This Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla*, 130 S. Ct. at 1482, *citing Hill v. Lockhart*, 474 U.S. 52, 57 (1985), and *McMann v. Richardson*, 397 U.S. 759, 770–771 (1970). Until recently, however, a criminal defendant was protected in the plea negotiation process only against threats, misrepresentations, and bribes;[14] broken promises;[15] and a failure to disclose the "direct" or court-imposed consequences of conviction.[16] Counsel was expected to do no more than provide competent advice about the rights a defendant was forgoing by entering a guilty plea.[17] In *Padilla*, this Court

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two cases is claimed to have fallen short of an objective standard of reasonableness can in no way be described as "tactical decisions." *See infra*, Part II.A.

[14] *Brady v. United States*, 397 U.S. 742, 755 (1970) (citing with approval *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on confession of error on other grounds*, 356 U.S. 26 (1958)).

[15] *Santobello v. New York*, 404 U.S. 257, 261-62 (1971).

[16] *Brady*, 397 U.S. at 755.

[17] *McMann*, 397 U.S. at 769-71; *see also Libretti v. United States*, 516 U.S. 29, 50-51 (1995) ("Apart from the small class of rights that require specific advice from the court under Rule 11(c), it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea

recognized that counsel's Sixth Amendment duty to advise the client about the consequences of pleading guilty is frequently broader and more subtle. In holding that a lawyer should have affirmatively advised his client about the deportation consequences of pleading guilty, the *Padilla* Court noted that plea negotiation has become the predominant way of resolving criminal cases. 130 S. Ct. at 1485 n.13 (noting that nearly 95% of criminal convictions result from pleas).[18] The overwhelming reliance on disposition by plea in today's justice system has made it essential that defendants considering a guilty plea should not be "left to the 'mercies of incompetent

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would forgo."); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 29 CAL. L. REV. __ (forthcoming), University of Pennsylvania Public Law and Legal Theory Research Paper Series 40, available at http://ssrn.com/abstract=1694111 ("Plea bargaining, [the Court] assumed, was sufficiently protected by the option of going to trial and by plea colloquies that explained the trial procedures defendants were waiving.").

[18] More recent studies confirm the 2003 data cited by the Court in *Padilla*. *See* Bureau of Justice Statistics Bulletin, May 2010, NCJ 228944 (reporting that in 2006, in state courts in the nation's 75 largest counties, 68% of felony defendants were eventually convicted, and 95% of those convictions were by a guilty plea); *see also Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009) ("only a small fraction of . . . cases actually proceed to trial," noting the 5% figure provided in the Brief for Law Professors as *Amici Curiae* 7-8); Stephanos Bibas, *The Myth of the Fully Informed Rational Actor*, 30 ST. LOUIS PUB. L. REV. __ (2011) (forthcoming, available from the ABA) (plea bargaining is "no longer a negligible exception to the norm of trials; it is the norm").

counsel.'" *Id.* at 1486, *quoting McMann*, 397 U.S. at 771.[19]

At the same time, this Court has been understandably reluctant to second-guess strategic decisions made by counsel in the plea bargaining process. In *Premo v. Moore*, 131 S. Ct. 733, 741 (2011), the Court observed that plea agreements are "the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks." Thus, the Court concluded that the substantive standard for reviewing counsel's strategic choices must be whether there was "manifest deficiency in light of information then available to counsel." *Id.*

In the cases presently before the Court, however, the claimed deficiency in counsel's performance did not involve a strategic choice that turned out badly for the client. Rather, as discussed in the following section, the failure to convey a plea offer and the provision of plainly erroneous advice about the charges and standard of proof, like *Padilla*'s failure to warn about deportation consequences, fell below "an objective

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[19] Professor Ronald Wright has concluded, based on a study of plea and conviction statistics across the second half of the twentieth century, that federal defendants who would otherwise have been acquitted at trial have increasingly pleaded guilty instead. He attributes this in substantial part to increased prosecutorial power, and prosecutors' ability to threaten large penalties for going to trial and to promise large rewards for pleading guilty. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 84-86, 100-12, 129-37, 150-54 (2005).

standard of reasonableness" under "prevailing professional norms." *Strickland*, 466 U.S. at 688.

II. WHERE DEFENSE COUNSEL'S FAILURE TO CONVEY A PLEA OFFER OR ERRONEOUS ADVICE ABOUT LEGAL STANDARDS CAUSES THE CLIENT TO LOSE THE BENEFIT OF A FAVORABLE PLEA, COUNSEL'S PERFORMANCE SHOULD BE DEEMED CONSTITUTIONALLY DEFICIENT.

A. A Lawyer is Required Under Applicable Professional Norms to Communicate With the Client About a Plea Proposal, and to Advise the Client Competently Respecting the Proposal.

A lawyer's professional obligation to represent a client competently and diligently, and to communicate with the client about significant developments in the case, has been part of the American Bar Association's ethical canons for over a century.[20] These ethical

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[20] *See* ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969), EC 7-4 through 7-7; ABA CANONS OF PROFESSIONAL ETHICS, Canon 8 (1908). As relevant here, Canon 8 provided:

> A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reasons of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever

duties, which form the basis for rules governing the professional conduct of lawyers in almost every state, have a particular relevance in the context of plea discussions. As discussed in Part I, these rules, together with the ABA CRIMINAL JUSTICE STANDARDS, require that a lawyer communicate with the client about plea offers and advise the client candidly and competently in order to enable the client to make an informed decision respecting the plea. *See also* Defense Function Standard 4-4.1(a) (defense counsel is obligated to investigate "facts relevant to the merits of the case and the penalty in the event of conviction"); Defense Function Standard 4-5.1(a) ("After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.").

In the instant cases, the findings of the lower courts respecting defense counsel's performance amply demonstrate deficient performance when measured against the standards of professional competence discussed above. In No. 10-444, counsel was found to have failed completely to communicate to his client an evidently advantageous plea offer, contrary to ABA Model Rules 1.2(a) and 1.4(b), and Defense Function Standards 4-5.2(a) and 4-6.2(b). In No. 10-209, defense counsel was found to have failed to provide his client considering a guilty plea offer with accurate advice about the elements of the charges and the burden of proof, in violation of ABA Model Rules 1.1 and 1.4(b), Defense Function Standards 4-4.1(a), 4-5.1(a) and 4-

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the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

6.1(b), and Pleas of Guilty Standard 14-3.2(b). These deficiencies were not related to strategic choices by counsel, but were failures to comply with clearly stated and generally accepted objective standards of professional competence. *Cf. Premo*, 131 S. Ct. at 741. That is, these are not cases in which the deficiencies in counsel's action can be defended as a tactical decision or where deference should otherwise have been accorded to counsel's judgment. *See Strickland*, 466 U.S. at 689.

B. Where Deficient Performance Causes a Defendant to Lose the Benefit of a Favorable Plea Proposal, the Defendant Has Been Prejudiced, and Thus Deprived of the Effective Assistance of Counsel to Which the Sixth Amendment Entitles Him.

1. The prejudice analysis in *Hill v. Lockhart* is inapposite where a defendant does not take a plea offer because of deficient counsel.

Prejudice is established for purposes of the Sixth Amendment where there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 691; *accord Hill v. Lockhart*, 474 U.S. 52, 57 (1985). Petitioners and the United States as *amicus curiae* in support of Petitioners have argued that the formulation of the prejudice standard in *Hill* altered the *Strickland* test whenever ineffective assistance is alleged during the plea process, so that a defendant must show that but for his counsel's deficient performance he "would have pleaded not guilty and insisted on going to trial." *See Hill*, 474

U.S. at 59. By this reasoning, a defendant who rejects a plea offer and goes to trial can never meet the constitutional test of ineffective assistance regarding anything that occurred during the negotiation stage. Nor, presumably, can a defendant who subsequently accepts a less favorable plea offer, since he too will be unable to show that, but for his counsel's default, he "would have pleaded not guilty." *See id.*

Rather than *Hill* changing *Strickland*'s prejudice standard, however, the language on which Petitioners rely ("would have . . . insisted on going to trial") simply spells out what the defendant in *that* case needed to show to establish prejudice in the plea process, since he had in fact accepted a plea offer and therefore had given up his right to go to trial. The prejudice test in *Hill*, a case involving counsel's failure to warn about parole eligibility, "focuse[d] on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.*; *see also Padilla*, 130 S. Ct at 1485 ("to obtain relief on this type of claim [of failure to warn about deportation], a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances"); Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 HOW. L. J. 693, 712-719 (2011) (arguing that *Padilla* marks a rejection of a trial-outcome test of prejudice for ineffective assistance in the plea process).

These cases are distinguishable from *Premo v. Moore*, *supra*, where this Court noted the potential for eroding principles of acceptance of responsibility and acknowledgment of guilt "if a guilty plea is too easily set aside based on facts and circumstances not apparent to a competent attorney when actions and

advice leading to the plea took place." 131 S. Ct. at 741. In *Premo*, the Court concluded that counsel's failure to seek suppression of the defendant's confession before discussing a plea could reasonably be considered a "strategic" choice that courts should be reluctant to second-guess. *Id.* at 743. By contrast, a complete failure to convey an advantageous plea offer (No. 10-444) and plainly erroneous advice about the standard for proving guilt (No. 10-209) do not involve any "facts and circumstances not apparent to a competent attorney," and could not conceivably be considered part of a reasonable defense strategy.

2. The fact that respondents were ultimately convicted and sentenced pursuant to constitutionally adequate procedures does not nullify the prejudice that infected the earlier plea stage.

If Sixth Amendment prejudice can be established only where a defendant does not go to trial, then a defendant who goes to trial (or who accepts a less favorable plea offer) would be foreclosed from claiming ineffective assistance at an earlier stage of the case. But a constitutional violation in the pre-trial stages of a criminal case is not shielded from review simply because the trial portion of the case proceeds without additional error. For example, this Court held in *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1977), that ineffective assistance of counsel in relation to pre-trial investigation and in failing to file a motion to suppress evidence can itself require relief, even if the resulting trial is otherwise basically fair and counsel's performance is otherwise unobjectionable. This Court has recently reaffirmed the principle that even though

the purpose of the rights set forth in the Sixth Amendment is to ensure a fair trial, "it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2716 (2011). If the defendant's Sixth Amendment rights are violated, "[n]o additional showing of prejudice is required to make the violation 'complete.'" *Id.*

In the present cases, the courts below found that if respondents had been properly advised of the existence and import of the plea offers, they would have accepted them, so that the further "constitutionally adequate" proceedings would not have occurred. While a finding of prejudice in this context does not settle the question of appropriate remedy,[21] deficient representation at the plea stage is not vitiated simply because later proceedings in the case were free from additional taint.

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[21] The Solicitor General argues in support of Petitioners that "the absence of any coherent remedy for a forgone plea confirms that respondent suffered no Sixth Amendment prejudice." *See* Brief for the United States as *Amicus Curiae* at 24, 32. But this odd inversion of the equitable principle "*ubi jus ibi remedium*" takes no account of the many courts that have over the years found a way to fashion remedies for constitutional violations at the pretrial stages of a case. *See, e.g.*, David A. Perez, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532 (2011), and cases cited *infra* at p. 24. The fact that this exercise is sometimes difficult and the result usually imperfect, as the Missouri court in 10-444 acknowledged, *Frye v. State*, 311 S.W.3d 350, 360 (Mo. Ct. App. 2010), should not be a reason for abandoning the effort altogether, much less for concluding, as the Solicitor General recommends, that there has been no violation at all. The Missouri court specifically rejected a similar argument, noting that "[w]e do not believe the determination of prejudice can be bootstrapped in this fashion." *Id.*

III. A POST-CONVICTION COURT SHOULD HAVE BROAD DISCRETION TO FASHION A REMEDY WHERE A DEFENDANT LOSES THE BENEFIT OF AN ADVANTAGEOUS PLEA BECAUSE OF CONSTITUTIONALLY INEFFECTIVE COUNSEL.

Longstanding ABA policy provides that where a court determines in post-conviction proceedings that a defendant lost the benefit of an advantageous plea offer because of constitutionally ineffective counsel, the court should have broad discretion to fashion a remedy. *See* Standard 22-2.1 of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, POST-CONVICTION REMEDIES (2d ed. 1978) (hereinafter "Post-Conviction Remedies Standards") ("[a] post-conviction proceeding should be sufficiently broad to provide relief [for meritorious claims] that the conviction was obtained or sentence imposed in violation of the Constitution"). Post-Conviction Remedies Standard 22-4.7(a)(ii) identifies the kinds of relief a post-conviction court should be able to order when it finds error "in the trial or pretrial stages of the process leading to conviction," noting that "the kind of affirmative relief ordered will vary with the nature of the meritorious contention." Post-Conviction Remedies Standard 22-4.7(a)(ii) specifies that if further prosecution is foreclosed, "the order of the court should provide for immediate discharge from custody." *Id.* If there is no bar to further prosecution,

> the order of the court should provide for discharge from custody within a stated period of time unless, within that time, the state takes the necessary steps to commit the applicant to

> custody pending reindictment, rearraignment, retrial, or resentence, as the case may be. In some instances, only a declaration of invalidity of the prior conviction may be required.

Id. Under these Standards, a defendant who has been harmed by constitutionally deficient counsel in pre-trial proceedings should be placed insofar as possible in the position he or she would have been in had the constitutional violation not occurred. *See also* Pleas of Guilty Standard 14-2.1(b)(i)(A) (a defendant denied effective assistance of counsel at the plea stage should be permitted to withdraw a plea even after a criminal sentence has been imposed).

Consistent with this Court's general instruction that the remedy for a Sixth Amendment violation "should be tailored to the injury suffered and should not unnecessarily infringe on competing interests," *United States v. Morrison*, 449 U.S. 361, 364 (1981), the courts have fashioned a variety of remedies where a defendant has been prejudiced by counsel's deficient performance by counsel at the plea negotiation stage. In some cases where a constitutional violation caused the defendant to forego a favorable plea offer, the court has vacated the conviction and given the government an opportunity to re-prosecute the case. *See* Perez, *supra*, 120 YALE L.J. at 1554-60. In other cases, particularly where re-prosecution is impracticable or inappropriate, the court has declined to vacate the conviction and ordered a remedy sometimes styled as "specific performance" of the lost plea deal. *Id.* at 1548-50. The court in No. 10-444 appears to have elected the first approach, while the court in No. 10-209 chose the second. Each court appears to have fashioned a remedy reasonably calculated to place the

defendant insofar as possible in the position he would have been in had the right to effective assistance not been violated.

The key to the question of remedy in cases where a defendant has lost the benefit of a favorable plea offer because of counsel's deficient performance, the ABA suggests, is to recognize that the purpose of plea negotiations is for "the defense and prosecution to reach agreements that . . . satisfy the interests of both parties." *Padilla*, 130 S. Ct. at 1486. The prevalence of plea bargaining in today's justice system guarantees that almost every criminal prosecution is susceptible to more than one mutually acceptable outcome. Similarly, the role of the post-conviction court in fashioning a remedy for constitutional violations in the plea process should be to approximate a just outcome in light of present circumstances. This may include consideration of a plea agreement that was on the table (but not communicated or adequately explained to the defendant) or modifications that were reasonably probable through further negotiation. Where a court concludes that it is impracticable for the government to retry the case, a remedy may be one that approximates the probable outcome had there been no constitutional violation.

The remedy should be one reasonably calculated to leave the defendant no worse off – but not necessarily better off – than he would have been had counsel performed effectively in the first place. Since the State bears responsibility under the Sixth and Fourteenth Amendments for ensuring that each defendant enjoys effective assistance of counsel, *see Cuyler v. Sullivan*, 446 U.S. 335, 343-44 (1980), any prejudice to the State from undoing a constitutional harm of this kind is

simply an inevitable cost, once the constitutional harm is identified, of compliance with the Constitution that should be given little weight.

Petitioner in No. 10-209 contends that providing a remedy for Sixth Amendment violations resulting in the loss of an advantageous plea "allows a defendant to play with house money." Brief for Petitioner Lafler at 20. This colorful but cynical description of how a defendant can "take his chances at a fair trial" and still "demand and receive the benefit of the forgone plea," would require that defense lawyers collude with their clients to "game the system," and assumes that courts cannot detect and punish any such unethical conduct if it should occur. Petitioner in No. 10-444 similarly warns that affirming the state court's judgment will encourage lawyers to engage in unethical conduct: *e.g.*, "a shrewd defense attorney seeking the best possible outcome for the client might strategically allow a plea offer to expire without communicating it to the defendant, knowing that the expired offer will act as a sort of insurance policy against worse results at trial." Brief for Petitioner State of Missouri at 36.

This Court should reject Petitioners' invitation to base a constitutional rule on an assumption that members of the Bar will choose to violate their own ethical responsibilities and their states' rules of professional conduct. In doing so, counsel would first impose on the judicial system, their clients and themselves the increased costs and risks of going to trial, following which they would either have to commit perjury at the post-conviction hearing – if one were granted, which it seldom is – or confess at such a hearing to conduct that would warrant the imposition

of professional discipline.[22] *See* Model Rules, R. 1.4(a)(1); R. 3.3(a) (a lawyer "shall not knowingly . . . make a false statement of fact or law to a tribunal").

Further, a court considering whether counsel had performed to the required standard would weigh the testimony of those involved as it would weigh the testimony of any witness. And the court would consider the interest that any or all of them have in the outcome of such proceedings. *See, e.g., United States v. Day*, 969 F.2d 39, 46 n.9 (3d Cir. 1992). Several federal circuits have long conducted such proceedings. *See, e.g., Boria v. Keane*, 99 F.3d 492, 498-99 (2d Cir. 1996), *cert. denied*, 521 U.S. 1118 (1997); *Day*, 969 F.2d at 47; *Blaylock*, 20 F.3d at 1468-69; *Turner v. Tennessee*, 858 F. 2d 1201, 1208 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989). In addition, prosecutors can minimize the opportunity for unethical "gaming" of the system by placing a plea offer on the record in the presence of the defendant.[23]

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[22] The ABA suggests that Petitioners' position should be equally offensive if, instead, it were asserted that prosecutors would routinely lie in responding to post-conviction petitions of this kind by denying that a particular plea offer had been extended, when in fact it had.

[23] Such a procedure would also give the court an opportunity to inquire whether counsel has explained to the client the consequences of taking or not taking the plea offer. *See, e.g., Rivera-Longoria v. Slayton*, 242 P.3d 171, 174 (Ariz. Ct. App. 2010) (holding that under ARIZ. R. CRIM. P. 15.8 the prosecutor must place on the record a plea offer 30 days prior to withdrawing it). The *Rivera-Longoria* court explained that Rule 15.8 was enacted in response to the holding in *Donald*, 10 P.3d at 1205 (finding ineffective assistance based on counsel's failure to convey plea offer), and is "designed to protect a defendant's constitutional

Finally, the concern to "protect[] the finality of convictions," *Padilla*, 130 S. Ct. at 1485, whether obtained through a guilty plea, as in 10-444, or through a jury verdict, as in 10-209, is significant. However, whether constitutionally deficient lawyering has resulted in a plea that is accepted, as in *Hill* and *Padilla*, or is undelivered or rejected, as in these cases, "[s]urmounting *Strickland*'s high bar is never an easy task." *Id.* The concern that some frivolous or fraudulent motions may be filed must be balanced against the lack of remedy for violations of a defendant's constitutional right to effective assistance of counsel.

For these reasons, the Court should reject any suggestion that a defendant is entitled to no relief for constitutionally ineffective assistance of counsel that results in loss of an advantageous plea offer. Further, the question of remedy should be left to the discretion of post-conviction courts to fashion relief that is reasonably calculated to place the defendant insofar as

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right to effective assistance of counsel when considering a plea offer. . . [by ensuring that] if a plea offer is extended, the defendant will have all material information to make an informed decision." *Id.*; *see also* ARIZ. R. CRIM. P. 15.8 cmt. (stating that Rule 15.8 is designed "to enable the defendant to make an informed decision on the plea offer with the effective assistance of counsel"); *see also* Standard 19-2.3(a) of the ABA STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d ed. 2004) ("court [should] ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction," a "requirement [that] may be satisfied by confirming on the record that defense counsel's duty of advisement under Standard 14-3.2(f) has been discharged").

possible in the position he or she would have been in had the constitutional violation not occurred.

CONCLUSION

For the reasons set forth above, the ABA respectfully submits that the judgment of the court below should be affirmed in each of these cases.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 10-209 & 10-444

In the Supreme Court of the United States

BLAINE LAFLER,

Petitioner,

v.

ANTHONY COOPER,

Respondent.

STATE OF MISSOURI,

Petitioner,

v.

GALIN E. FRYE,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, SUPPORTING RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The Center on the Administration of Criminal Law (the "Center") is an organization dedicated to developing and promoting best practices in the administration of criminal justice through academic research, litigation, and participation in the formulation of public policy. The Center's litigation component aims to use its empirical research and experience with criminal justice practices to assist in important criminal justice cases in state and federal courts throughout the United States.

The Center is well-suited to provide historical and empirical context to aid this Court's understanding of the importance of the Sixth Amendment right to effective assistance of counsel during the plea process. This brief provides that context and also proposes prophylactic measures that would, if adopted, reduce the risk going forward that counsel's ineffective assistance will deprive a defendant of an opportunity to make informed decisions about his defense during plea negotiations.[1]

SUMMARY OF ARGUMENT

This Court has recognized that "[t]he disposition of criminal charges by agreement between the prosecutor and the accused ... is an essential component of the

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* represents that this brief was authored solely by *amicus curiae* and its counsel and that no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties were notified of *amicus curiae*'s intention to file this brief in accordance with Supreme Court Rule 37, and all parties consent to the filing of this brief.

administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971). The prevalence of plea bargaining has revolutionized criminal law in this country. Because most defendants forgo their right to trial and resolve criminal charges against them through a plea, the plea process determines the outcomes of the overwhelming majority of criminal cases in the United States.

The obvious disparities in power, information, and resources between defendants and prosecutors make effective assistance of counsel in plea negotiations crucial. The right to effective assistance of counsel is an essential check on the operation of the plea system and is critical to ensuring that defendants' plea decisions are voluntary and intelligent. Accordingly, this Court has recognized that effective assistance of competent counsel is the touchstone for the constitutional legitimacy of the plea process. *See, e.g.*, *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

In *Hill v. Lockhart*, this Court held that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." 474 U.S. 52, 58 (1985). "*[I]n the context of guilty pleas*," this Court explained, *Strickland*'s prejudice requirement "focuses on whether counsel's constitutionally ineffective performance *affected the outcome of the plea process*." *Id.* at 58-59 (emphasis added). Hill argued that his plea was involuntary because his attorney had misinformed him as to when he would be eligible for parole. On those facts, therefore, Hill had to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

Petitioners and the United States as *amicus curiae* miscast *Hill* as identifying the *only* circumstance in which the right to counsel at the plea bargain stage may be effectively enforced. The Court in *Hill* naturally described the showing of prejudice required in a way that made sense in that particular context: there, the defendant pleaded guilty based on allegedly incorrect information about the consequences of his plea. But the Court conspicuously did *not* attempt to announce in *Hill* a one-size-fits-all rule for every circumstance. Rather, the Court emphasized that *Strickland* prejudice may manifest itself in a variety of ways. *See id.* at 59-60.

When counsel's deficient performance deprives a defendant of a meaningful opportunity to consider a plea agreement, that defendant's right "to make [a] fundamental decision[] regarding his case," *Jones v. Barnes*, 463 U.S. 745, 751 (1983), has been irrevocably compromised. As the federal courts of appeals have uniformly concluded (along with most state appellate courts that have considered the question), such a defendant demonstrates prejudice if there is a "reasonable probability that" "counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. In other words, defendants like Cooper and Frye—who either were deprived entirely of the opportunity to consider a plea offer, or rejected an offer based on counsel's patently deficient advice—demonstrate prejudice if there is a reasonable probability that, but for counsel's unprofessional errors, they would have accepted a lawful plea agreement offered by the prosecution.

The prejudice suffered by such defendants cannot be "cured" by a subsequent fair trial. Once the deprivation of the right to make a fundamental decision about one's defense is complete, a showing of prejudice flowing from *that deprivation* is sufficient to satisfy *Strickland*. That concept of prejudice fits comfortably within this Court's precedents, which establish that the Sixth Amendment right to effective assistance of counsel is not merely in service of a defendant's Fifth Amendment right to a fair trial. Recognizing prejudice in such circumstances is essential to ensuring that the right to effective assistance of counsel at every critical phase of criminal proceedings is not an empty promise at the plea phase—which, as a practical matter, is usually the only phase of proceedings. Moreover, because States are free to devise, as a matter of state law, appropriate remedies for violations of their citizens' federal constitutional rights, this Court should defer to the remedy fashioned by the courts of the State of Missouri in No. 10-444.

When the State offers a plea, it is making a statement that the interests of justice and enforcement of law are adequately served by that offer. Almost by definition, a higher sentence is overly punitive in the circumstances by the State's own calculus. Of course, where a defendant makes a fully informed decision to reject a plea offer and go to trial, it is only reasonable and fair that acceptance of a later offer (if any), or disposition without a plea deal, result in a harsher sentence. But when a defendant's "rejection" is simply the result of a failure of defense counsel to communicate the offer, or the result of patently deficient advice concerning the offense with which the defendant is charged, the interests of justice are not

served by over-punishment. It therefore benefits both defendants and the prosecution to ensure that defendants make a fully informed decision about any plea bargain offered. Simple prophylactic procedures, including ensuring that all plea offers are made on the record in the presence of the defendant, would further that goal. A few States have already adopted such procedures, designed to safeguard defendants' rights to make critical decisions about their defense in light of all the relevant information available.

ARGUMENT

I. A MEANINGFUL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA NEGOTIATIONS IS DEMANDED BY THE SIXTH AMENDMENT AND IS A CRITICAL COMPONENT OF THE ADMINISTRATION OF CRIMINAL LAW

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. In the United States today, virtually all criminal defendants resolve criminal charges by pleading guilty. Absent the effective assistance of counsel, the disparities in information and power inherent in that process would undermine confidence in the outcome. As this Court has long recognized, defendants are entitled to effective assistance of counsel during the critical plea bargaining phase so that they can make voluntary and intelligent decisions during that process. *Hill*, 474 U.S. at 56; *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Contrary to petitioners' argument, the Sixth Amendment right to effective assistance of counsel

also protects a defendant's right to make informed decisions about his or her defense—including whether to plead guilty or proceed to trial. This Court should continue to safeguard that right by holding that a defendant may demonstrate prejudice by showing that, but for counsel's unprofessional errors, he would have accepted a pending offer for a lesser sentence than the one he ultimately received through a subsequent plea or after trial. Only by making the right to counsel at the plea stage meaningful can this Court ensure a tolerable degree of confidence in the plea process and its outcomes.

A. Confidence In The Plea Process And Its Outcomes Is Essential To The Administration Of Criminal Law

Nearly all criminal charges in the U.S. are resolved through plea agreements. According to the United States Sentencing Commission, "[i]n fiscal year 2009, more than 96 percent of all offenders [pleaded guilty], a rate that has been largely the same for ten years."[2] Statistics from state courts are virtually identical. In 2006, the most recent year for which data are available, some 95% of convictions obtained in state courts in the seventy-five most populous counties in the U.S. were obtained through guilty pleas.[3] "[P]lea bargaining ... is not some adjunct to the criminal justice system; it *is*

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[2] U.S. Sentencing Commission, *Overview of Federal Criminal Cases—Fiscal Year 2009*, at 3 (2010), *available at* http://www.ussc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf.

[3] *See* Thomas H. Cohen & Tracey Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006*, Bureau of Justice Statistics Bulletin (U.S. Dep't of Justice), rev. July 15, 2010, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf.

the criminal justice system." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1911-12 (1992). Confidence in the fairness of outcomes achieved through the plea process is therefore absolutely central to the administration of criminal law in this country.

The modern trend favoring guilty pleas was driven in large part by prosecutors' desire to lighten their caseloads. *See* George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America*, 44, 124 (2003).[4] Because most criminal cases are resolved without trial, a prosecutor's decision about what plea to offer and accept frequently amounts to a final adjudication of guilt and punishment. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan. L. Rev. 869, 878 (2009).

Lawmakers have taken account of this phenomenon, and "now legislate[] with precisely this framework of prosecutorial power over pleas in mind." *Id.* at 880. Indeed, "the Department of Justice and the various United States Attorneys' Offices often argue before Congress that legislation with inflated or mandatory punishments should be passed or retained because those laws give prosecutors the leverage they need to exact pleas and to obtain cooperation from defendants." *Id.*[5] As a result, state and federal

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[4] The practice has gained widespread support from judges for similar reasons. Plea bargaining not only creates more space on judges' calendars for growing civil dockets, Fisher, *supra*, at 123-24, it also guards against "the reputational blow of a reversal." *Id.* at 176.

[5] *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 728 & n.5 (2005) (providing examples).

prosecutors can typically choose from a menu of charges—and, therefore, from a menu of potential sentences, often including mandatory minimums. That prosecutorial leverage puts overwhelming pressure on defendants to plead and accept an offer of a lesser sentence. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 538 (2001).

Plea agreements may therefore result in sentences that reflect (more accurately than post-trial sentences) the intended punishment for the crime. Because "[p]leas and cooperation with the government are the preferred norm, not the exception," Barkow, *Institutional Design*, 61 Stan. L. Rev. at 880, "[c]riminal statutes now commonly permit (or purport to require) draconian punishments that no one expects to be imposed in the typical case"; "'[l]eniency' has therefore become not merely common but a systemic imperative." Sanford H. Kadish et al., *Criminal Law and Its Processes: Cases and Materials* 1006 (8th ed. 2007); *see also* Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 Stan. L. Rev. 1399, 1402 (2003) ("Given the extreme severity of sentencing in the United States by world standards ... it is hard to take seriously the notion that ninety percent of those serving our remarkably heavy sentences are the beneficiaries of 'bargains.'"); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 Crim. L.Q. 67, 87 (2005); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. Pa. L. Rev. 79, 129–30 (2005).

Because the punishment imposed through plea bargaining is, in a very real sense, the sentencing

norm, the public must have confidence that the results of that process reflect a fair and reliable outcome reached through a fundamentally fair process.

B. The Legitimacy Of Plea Bargaining Has Historically Depended On Effective Assistance Of Counsel To Counter The Inherently Coercive And Asymmetric Confrontation Between Prosecutor And Defendant

Effective assistance of counsel is central to the institutional legitimacy of plea deals, both because of the inherent risk of coercion during plea negotiations, and because of the stark information and other asymmetries between the parties.

Absent effective counsel, criminal defendants would be wildly disadvantaged vis-à-vis prosecutors at the bargaining table. In 2009, "[m]ore than half of the federal offenders sentenced ... had not completed high school and only 5.4 percent of offenders had completed college." U.S. Sentencing Commission, *Overview of Federal Criminal Cases – Fiscal Year 2009*, at 3 (2010), *available at* http://www.ussc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf. In light of this Court's recognition that "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law," *Powell v. Alabama*, 287 U.S. 45, 69 (1932), these statistics are a stark reminder that educated defendants are a relative rarity in our criminal justice system.

Beyond the obvious information and resource disparities between prosecutors and defendants, and in large part due to the systemic legislative "correction" for plea bargaining, *see supra*, 7-8, there are significant

disparities between sentences imposed through pleas and those imposed after a trial. Defendants who choose to go to trial thus risk suffering a severe "trial penalty." Candace McCoy, *Bargaining in the Shadow of the Hammer: The Trial Penalty in the USA, in The Jury Trial in Criminal Justice* 23, 25 (Douglas D. Koski ed., 2003); *see also* Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 Colum. L. Rev. 959, 992 (2005) (average penalty ranged from 13 to 461 percent depending on the state and the offense); Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. Mich. J.L. Reform 345, 347–48 (2005) (average sentence for federal defendants who go to trial is three times higher than the sentence for defendants who plead to similar charges). The trial penalty phenomenon only amplifies the risk of coercion inherent in all plea bargaining negotiations.[6]

The trial penalty burdens the innocent as well as the guilty. Even innocent defendants may choose to

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[6] The true trial penalty is likely substantially higher than these statistics suggest, given that most studies compare similar charges in assessing the trial penalty and do not account for the common practice of allowing a defendant to plead to a lesser offense than the one initially charged. *See* Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 Marq. L. Rev. 213, 227–28 (2007).

Prosecutors may also seek to impose additional penalties on those who exercise their right to go to trial, including property forfeiture, charges against friends and family, civil or regulatory sanctions, or immigration consequences. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 Cal. L. Rev. 1585, 1611 & n.97 (2005).

plead guilty rather than face trial and the attendant risk of a much harsher sentence. Indeed, some scholars have argued that such defendants are even more risk-averse than their guilty counterparts—and therefore more likely to accept a plea. Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 Yale L.J. 2011, 2012 (1992).[7] And because sentencing guidelines often prescribe harsher punishments for those claiming innocence (and thus not accepting responsibility), the pressure on innocent defendants to plead guilty is substantial. *See* Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 Am. Crim. L. Rev. 1363, 1394–98 (2000). The effects of this pressure are evident at least in the federal courts, where acquittal rates have steadily dropped as guilty pleas have risen. Wright, *Trial Distortion*, 154 U. Pa. L. Rev. at 102 (showing that acquittal rates fell from a peak of 5.5% of adjudicated case outcomes in 1971 to just 1% in 2002). Although guilty pleas have crowded out all trial outcomes, they have taken the heaviest toll on acquittals. *Id.* at 106.

Driven by the inherent disparities between defendants and prosecutors, as well as the grave risk of

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[7] *See also* Innocence Project, *250 Exonerated, Too Many Wrongfully Convicted* 32-33 (2010), *available at* http://www.innocenceproject.org/docs/InnocenceProject_250.pdf ("27% [of 250 inmates exonerated by DNA evidence] were convicted based at least in part on false confessions, admissions or guilty pleas."); *see also* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 74 (2008) (analyzing the cases of 200 convicts exonerated by DNA testing, 9 of whom had pleaded guilty to a rape or murder that they did not commit).

coercion at the bargaining table, this Court has long recognized a Sixth Amendment right to effective assistance of counsel during the plea process. The need for counsel's assistance to remedy information and other asymmetries between prosecutors and defendants is a consistent thread throughout this Court's Sixth Amendment decisions. *See, e.g.*, *Williams v. Kaiser*, 323 U.S. 471, 476 (1945) (because "[a] layman is usually no match for the skilled prosecutor," the right to effective counsel during plea negotiations is "'fundamental.'") (quoting *Powell*, 287 U.S. at 70); *id.* at 475-76 ("Only counsel [can] discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate."); *Van Moltke v. Gillies*, 332 U.S. 708, 721 (1948) ("Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered."); *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("[T]he adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances."); *Hill*, 474 U.S. at 56 ("Where ... a defendant is represented by counsel during a plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'") (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

Petitioners' and the United States' argument that the right to counsel attaches only at the entry of a guilty plea cannot be squared with these and other

precedents of this Court recognizing that the Sixth Amendment right to effective assistance of counsel attaches at the initiation of criminal proceedings against the accused, for any "'critical' stage[]" of those proceedings. *Maine v. Moulton*, 474 U.S. 159, 170 (1985) (citation omitted); *contra Frye* Petr. Br. 19; *Lafler* Petr. Br. 12 n.3; *Frye* U.S. Br. 23 n.6; *Lafler* U.S. Br. 18.

Moulton, for example, involved law enforcement's surreptitious recording of conversations between the defendant and a codefendant cooperator, after the defendant had been charged. 474 U.S. at 176-77. Holding that the defendant's Sixth Amendment right to counsel had been violated, the Court explained that the right attaches at the initiation of criminal proceedings, because "'[i]t is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Id.* at 170 (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)). In light of the arguments pressed here by petitioners and the United States, it is worth quoting the Court's opinion in *Moulton* at some length:

> The assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, 'critical' stages in the criminal justice

> process "where the results might well settle the accused's fate ...."

Id. (citation omitted).

Plea negotiations invariably take place after the initiation of criminal proceedings, and no phase of criminal proceedings requires a more direct confrontation between the defendant and prosecutor or is more likely to "settle the accused's fate." Thus, as this Court very recently reaffirmed, "the *negotiation of a plea bargain* is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (emphasis added).

C. A Defendant Who Is Deprived Of The Opportunity To Make An Informed Decision Regarding The Prosecution's Plea Offer Is Prejudiced If He Receives A Harsher Sentence Than He Would Have, But For Counsel's Unprofessional Errors

Under *Hill*, a defendant who accepts a plea based on counsel's deficient advice demonstrates *Strickland* prejudice if there is "a reasonable probability" that the "outcome of the plea process" would have been different but for counsel's errors. 474 U.S. at 59. In the instant cases, respondents Cooper and Frye were denied the opportunities to make informed decisions about whether to accept pending plea offers. As the federal courts of appeals uniformly have concluded, defendants like Cooper and Frye demonstrate prejudice under *Strickland* where there is a reasonable probability that the outcome of the plea process would have been different—*i.e.*, that they would have *accepted* the State's pending plea offer—but for counsel's unprofessional errors.

In *Strickland*, this Court adopted a two-part standard for evaluating claims of ineffective assistance of counsel. The defendant must show that (1) "counsel's representation fell below an objective standard of reasonableness," 466 U.S. at 687-88; and that (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

Applying that test in *Hill*, this Court held that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." 474 U.S. at 58. "*[I]n the context of guilty pleas*," this Court explained, *Strickland*'s prejudice requirement "focuses on whether counsel's constitutionally ineffective performance *affected the outcome of the plea process*." *Id.* at 58-59 (emphasis added). Hill argued that his plea was involuntary because his attorney had misinformed him as to when he would be eligible for parole. On those facts, therefore, Hill had to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

Petitioners and the United States as *amicus curiae* misread *Hill* as identifying the *only* circumstance in which there can be prejudice from the ineffective assistance of counsel at the plea bargain stage. *Hill* is not so circumscribed. The Court in *Hill* naturally described the showing of prejudice required in a way that made sense in that particular context: there, the defendant pleaded guilty instead of proceeding with trial, and allegedly made that decision based on incorrect information about the consequences of his plea. But the Court did *not* suggest, much less hold,

that a defendant could not demonstrate *Strickland* prejudice, as a matter of law, unless he or she had entered a guilty plea relying on the deficient advice of counsel.

When counsel's deficient performance deprives a defendant of a meaningful opportunity to consider a plea offer, that defendant's right "to make [a] fundamental decision[] regarding his case," *Jones v. Barnes*, 463 U.S. 745, 751 (1983), has been irrevocably compromised. *See also Nunes v. Mueller*, 350 F.3d 1045, 1053 (9th Cir. 2003) (quoting *Jones* and holding that such a defendant has been deprived of "the right to participate in the decision as to, and to decide, his own fate—a right also clearly found in Supreme Court law"); *In re Alvernaz*, 830 P.2d 747, 755 (Cal. 1992) (citing *Jones* for the proposition that "a defendant possesses a constitutionally protected right to participate in the making of certain decisions which are fundamental to his or her defense").

A defendant's right to make fully informed decisions about his or her case is distinct from the right to a fair trial, but is no less important, particularly in view of the high proportion of criminal cases resolved through plea bargaining. As this Court recently reminded in the choice-of-counsel context, "[i]t is true enough that the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *United States v. Gonzales-Lopez*, 548 U.S. 140, 145 (2006); *see also Williams v. Jones*, 571 F.3d 1086, 1092 (10th Cir. 2009) ("*Gonzalez-Lopez* recognizes that counsel can be ineffective where 'his mistakes have harmed the defense.' Surely, the plea process is part of the

defense.") (quoting *Gonzalez-Lopez*, 548 U.S. at 147), *cert. denied*, 130 S. Ct. 3385 (2010).

As the federal courts of appeals have uniformly concluded, such a defendant demonstrates prejudice under *Strickland* and *Hill* if there is a "reasonable probability that" "counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. In other words, defendants like Cooper and Frye—who either were deprived entirely of the opportunity to consider a plea offer, or rejected an offer based on counsel's patently deficient advice—demonstrate prejudice if there is a reasonable probability that, but for counsel's unprofessional errors, they would have accepted the plea.

The prejudice suffered by such defendants cannot be "cured" by subsequent constitutionally adequate procedures. Once the deprivation of the right to make a fundamental decision about one's defense is complete, a showing of prejudice flowing from that deprivation is sufficient to satisfy *Strickland*. That concept of prejudice fits comfortably within this Court's precedents, and it is essential to ensuring that the right to effective assistance of counsel at every critical phase of criminal proceedings is not an empty promise at the plea phase—which, as a practical matter, is often the most critical and indeed the only phase of proceedings.

Petitioners and their *amici* create a straw man by framing the issue as whether the defendants have a constitutional right to a plea bargain, or a right to receive the lowest possible sentence. Defendants, of course, do not have a freestanding right to receive a particular plea offer or any plea offer at all. But defendants also do not have a constitutional right to an appeal, *Jones*, 463 U.S. at 751, yet defendants are

entitled to effective assistance of counsel when there is an opportunity to appeal, *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000).

"Incompetent advice [during plea bargaining] distorts the defendant's decisionmaking process," *Padilla*, 130 S. Ct. at 1493 (Alito, J., concurring), thereby depriving him or her of the right "to make certain fundamental decisions regarding [his] case," including "whether to plead guilty," *Jones*, 463 U.S. at 751; *see also Frye* U.S. Br. at 17 ("[A] defendant must establish that counsel's deficient performance deprived him of a 'substantive or procedural right to which the law entitles him.'") (citation omitted). For these reasons, petitioners' and the Solicitor General's reliance on *Lockhart v. Fretwell*, 506 U.S. 364 (1993), and *Nix v. Whiteside*, 475 U.S. 157 (1986), is entirely misplaced. *See, e.g., Frye* U.S. Br. 15-17.

In *Whiteside*, the defendant petitioned for habeas corpus relief from his state murder conviction on the ground that his counsel was ineffective for refusing to cooperate in presenting perjured testimony. 475 U.S. at 162-63. Because the attorney conformed to "accepted norms of professional conduct" in refusing to assist perjury against his client's wishes, this Court "discern[ed] no failure to adhere to reasonable professional standards that would in any sense make out a deprivation of the Sixth Amendment right to counsel." *Id.* at 171. In other words, the defendant's claim failed step one of *Strickland*, so the later discussion of whether Whiteside was "prejudiced" by his failure to perjure himself is superfluous dicta. *See id.* (counsel's "representation of Whiteside f[ell] well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable

under *Strickland*"). In the instant cases, by contrast, there is no genuine dispute that counsel's errors fell outside "accepted standards of professional conduct." (As the Solicitor General points out, the questions presented are premised on the fact that they did. *Frye* U.S. Br. 13 n.2.)

Moreover, nothing in this Court's discussion of prejudice in *Whiteside* suggests, much less "confirm[s]," *Frye* U.S. Br. 15, that there is no "cognizable prejudice" when counsel's unprofessional errors undermine the fairness of the plea process. Indeed, it is startling that the United States would compare Whiteside's desire to present perjured testimony with these defendants' insistence on the right to make informed decisions fundamental to their liberty.

Fretwell is equally inapposite. There, the defendant argued that he had been prejudiced by his counsel's failure to make an objection at the capital sentencing phase of his trial based on a then-valid Eighth Circuit decision, *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985), holding that a death sentence is unconstitutional if based on an aggravating factor that duplicates an element of the underlying felony. *Fretwell*, 506 U.S. at 384. Although the Eighth Circuit had since overruled *Collins*, thereby recognizing that *Collins* was legally erroneous, that court held on habeas review that Fretwell had shown prejudice under *Strickland*, because the trial court would have sustained the *Collins* objection, had it been made at Fretwell's trial. This Court reversed, explaining that a defendant seeking to demonstrate *Strickland* prejudice must show that counsel's errors rendered the proceedings "unfair or unreliable." *Id.* at 369. The Court explained

that Fretwell's sentencing was neither unfair nor unreliable, because "ineffectiveness of counsel [did] not deprive [Fretwell] of any substantive or procedural right to which the law entitles him." *Id.* at 372.

As in *Whiteside*, Fretwell was not entitled "'to the luck of a lawless decisionmaker.'" *Id.* at 370 (quoting *Whiteside*, 475 U.S. at 175, in turn quoting *Strickland*). That is, a defendant cannot "demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry." *Id.* at 373 (O'Connor, J., concurring); *id.* at 373-74 (listing the "likely effect of perjured testimony," "the impact of a meritless Fourth Amendment objection," and "the effect of an objection [that is] wholly meritless under current governing law" as the only factors the Court has held to be impermissible considerations in the prejudice inquiry).

A defendant who receives ineffective assistance of counsel during plea negotiations because counsel withheld information, or provided materially false information relevant to the fundamental decision to plead or go to trial, has been deprived of his right to exercise authority over fundamental decisions in his defense. That is a substantive right to which the law entitles him, *see Barnes*, 463 U.S. at 751, the deprivation of which renders the outcome fundamentally "unfair" under *Fretwell*. *See Padilla*, 130 S. Ct. at 1493 (Alito, J., concurring) ("[I]ncompetent advice [during plea bargaining] distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question."); *cf. Gonzales-Lopez*, 548 U.S. at 145 (defendant's Sixth Amendment rights cannot be simply "disregarded so long as the trial is, on the whole, fair").

Adopting variants of this reasoning, *every* federal court of appeals—and all but two state appellate courts to have addressed the question—recognize that a defendant who rejects a favorable plea offer and proceeds to trial is entitled to relief under the Sixth Amendment if he can prove that there is a reasonable probability that he would have accepted the plea offer but for counsel's unprofessional errors. *See United States v. Rodriguez*, 929 F.2d 747, 753 n.1 (1st Cir. 1991) ("[T]he fact that a defendant, after rejecting a guilty plea, still receives all the constitutional protections of trial does not preclude an attack on sixth amendment grounds if counsel's performance during plea bargaining" was ineffective.); *United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998) (defendant suffered prejudice, even though the government had not made a formal plea offer, because "he did not have accurate information upon which to make his decision to pursue further plea negotiations or go to trial," due to counsel's errors); *United States v. Day*, 969 F.2d 39, 42 (3d Cir. 1992) (defendant stated claim for ineffective assistance of counsel where he alleged that he would have accepted a plea bargain but for trial counsel's failure to explain that defendant might be classified as a "career offender"); *Arnold v. Thaler*, 630 F.3d 367, 372 (5th Cir. 2011) ("[T]o establish that he was prejudiced by his counsel's deficient performance, [defendant] need only demonstrate a reasonable probability that he would have accepted the ... plea offer before it was withdrawn, had his counsel told him about the offer."); *Griffin v. United States*, 330 F.3d 733, 737 (6th Cir. 2003) ("The second element of the *Strickland* test in the plea offer context is that there is a reasonable probability the petitioner would have pleaded guilty given competent advice."); *Julian v.*

Bartley, 495 F.3d 487, 498 (7th Cir. 2007) ("In the context of plea agreements, the prejudice prong focuses on whether the deficient information was the decisive factor in a defendant's decision to plead guilty or to proceed to trial."); *Kingsberry v. United States*, 202 F.3d 1030, 1032 (8th Cir. 2000) (holding that "prejudice is possible, notwithstanding a subsequent fair trial, where counsel failed to provide accurate advice regarding a plea agreement offer"); *Nunes*, 350 F.3d at 1053 (prejudice resulted where defendant was deprived of "the right to counsel's assistance in making an informed decision once a plea had been put on the table"); *Williams v. Jones*, 571 F.3d at 1090 n.3 ("[A] defendant is required to show that counsel's performance fell below an objective level of reasonableness and that, but for counsel's deficient performance, the defendant would have accepted the plea offer and pled guilty."); *Coulter v. Herring*, 60 F.3d 1499, 1504 (11th Cir. 1995) ("In other words, in this instance, Coulter 'must show that there is a reasonable probability that, but for counsel's errors, he would ... have pleaded guilty and would [not] have insisted on going to trial.'") (quoting *Hill*, 474 U.S. at 59); *In re Alvernaz*, 830 P.2d at 754; *People v. Curry*, 687 N.E.2d 877, 882 (Ill. 1997); *Commonwealth v. Mahar*, 809 N.E.2d 989, 993-94 (Mass. 2004); *In re Plante*, 762 A.2d 873, 876 (Vt. 2000); *Cottle v. State*, 733 So.2d 963, 966-67 (Fla. 1999); *Williams v. State*, 605 A.2d 103, 108 (Md. 1992); *Lloyd v. State*, 373 S.E.2d 1, 3 (Ga. 1988); *Larson v. State*, 766 P.2d 261, 263 (Nev. 1988); *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986); *Tucker v. Holland*, 327 S.E.2d 388, 394-96 (W. Va. 1985); *State v. Simmons*, 309 S.E.2d 493, 497-98 (N.C. Ct. App. 1983); *State v. Donald*, 10 P.3d 1193, 1200 (Ariz. Ct. App. 2000); *Ex parte Lemke*, 13 S.W.3d 791,

796-97 (Tex. Crim. App. 2000), *In re McCready*, 996 P.2d 658, 659-60 (Wash. Ct. App. 2000); *State v. Lentowski*, 569 N.W.2d 758, 761 (Wis. Ct. App. 1997); *Lyles v. State*, 382 N.E.2d 991, 994 (Ind. Ct. App. 1978).

Any other rule would render the Sixth Amendment right to counsel at the plea bargaining stage an empty promise, as a right without the possibility of relief from its deprivation is no right at all.

II. PROSECUTORS SHOULD BE ENCOURAGED TO OFFER ANY PLEA BARGAIN ON THE RECORD IN THE PRESENCE OF THE DEFENDANT

As this Court has long recognized, "the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law. Federal law simply 'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.'" *Danforth v. Minnesota*, 552 U.S. 264, 288 (2008) (quoting *American Trucking Assn's, Inc. v. Smith*, 496 U.S. 167, 178-79 (1990)); *see also Teague v. Lane*, 489 U.S. 288, 298-99 (1989); *Danforth*, 552 U.S. at 289 ("While we have ample authority to control the administration of justice in the federal courts[,] ... we have no comparable supervisory authority over the work of state judges."). Accordingly, if this Court agrees that respondents have a Sixth Amendment right to effective assistance during plea negotiations, it should defer to the Missouri courts as to the proper remedy in No. 10-444, *Missouri v. Frye*.

Petitioners' asserted fears that recognizing prejudice (and a remedy for it) in these circumstances will open the "floodgates" are unfounded. It bears emphasis that *every* federal court of appeals—and all

but two States to have considered the question—currently recognize prejudice under *Hill* and enforce Sixth Amendment rights in these circumstances, so a decision in respondents' favor would essentially maintain the status quo.

And, as this Court observed in *Padilla*, "[s]urmounting *Strickland*'s high bar is never an easy task." 130 S. Ct. at 1485. Similar "floodgates" claims were raised and rejected in *Hill*, and "[a] flood did not follow in that decision's wake." *Id.* at 1484-85; *see also* Gray Proctor & Nancy King, *Post*-Padilla: Padilla's *Puzzles for Review in State and Federal Courts*, 23 Federal Sentencing Reporter 239, 244 (2011) ("Although Padilla will probably result in an increase in prisoner filings, successful collateral challenges will be more of a trickle than the roaring stream of upset convictions evoked by the 'floodgates' imagery.").[8]

In the federal courts, pleas of guilty and *nolo contendere* rose sharply between 1991 and 2001, Wright, *Trial Distortion*, 154 U. Pa. L. Rev. at 91, concurrent with many of the federal court decisions recognizing that claims of ineffective assistance at the plea stage demand a remedy, *see, e.g.*, *Rodriguez*, 929 F.2d at 753 n.1; *Gordon*, 156 F.3d at 380; *Day*, 969 F.2d at 42; *Coulter*, 60 F.3d at 1504. There is no evidence that the widespread, nearly uniform development in Sixth Amendment jurisprudence has dampened

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[8] Similarly, in *Henderson v. Morgan*, this Court called Petitioner's fears that a decision in favor of the defendant would invite countless collateral attacks on judgments "exaggerated." 426 U.S. 637, 646-47 (1976). "Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused." *Id.* at 647.

prosecutors' enthusiasm for plea bargaining to even the slightest degree.

Petitioner Frye also argues that a ruling in respondents' favor would encourage defense attorneys intentionally to withhold offers, on the theory that such a strategy would be a win-win for their clients. *Frye* Petr. Br. 28. But the states are quite capable of crafting rules to prevent that sort of gamesmanship.

Arizona is a case in point. Like all the federal appellate courts and the majority of states that have addressed the issue, the Arizona Court of Appeals has held that "a defendant may state a claim for post-conviction relief on the basis that counsel's ineffective assistance led the defendant to make a uninformed decision to reject a plea bargain and proceed to trial." *Donald*, 10 P.3d at 1200. In response to that decision, the Arizona trial courts now routinely conduct a so-called *Donald* hearing when a defendant rejects a plea offer and decides to proceed to trial. *Donald* hearings are meant "to ensure, *prior to trial*, that [the defendant] adequately understood the state's plea offer and the consequences of conviction." *State v. Ware*, No. 2 CA-CR 2011-0010-PR, 2011 WL 1630274, at *2 (Ariz. Ct. App. Apr. 26, 2011); *id.* (denying defendant's ineffective assistance claim because he rejected plea offers following *Donald* hearings and therefore could not show prejudice); *see also Rivera-Longoria v. Slayton*, 242 P.3d 171, 172 (Ariz. Ct. App. 2010) (noting that the defendant had rejected a plea offer at a *Donald* hearing before asking for the offer to be reinstated).

States could of course devise other, even simpler, procedures towards the same goal. In New Jersey, for example, "[p]rior to the arraignment/status conference

the prosecutor and the defense attorney shall discuss the case, including any plea offer ... and report thereon at the arraignment/status conference." N.J. Ct. R. 3:9-1(b). The rules further provide that "[e]ach status conference shall be held in open court with the defendant present." N.J. Ct. R. 3:9-1(c). In addition, "[a]ny plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant's attorney." N.J. Ct. R. 3:9-1(b). New Jersey's rules "reflect the importance of informed plea bargaining, requiring that a defendant be advised at the pretrial conference of the sentencing exposure for the offenses charged." *State v. Dennis*, 2011 WL 31360, at *3 (N.J. Super. App. Div. Jan. 6, 2011) (citing Sylvia B. Pressler & Peter G. Verniero, *Current N.J. Court Rules*, cmt. 1.4.2. on R. 3:9-2 (2011)).

Other states may soon follow suit. For example, in *In re Alvernaz*, *see supra*, 16, the Supreme Court of California encouraged the memorialization of plea offers in order to discourage future claims that "with effective representation, [the defendant] would have accepted the proffered plea bargain." 830 P.2d at 756. Specifically, the court encouraged "parties to memorialize in some fashion prior to trial" (1) the fact that a plea bargain offer was made, (2) that the defendant was advised of the offer, its precise terms, and the range of punishments that could result from either accepting the plea bargain or proceeding to trial, and (3) the defendant's response to the offer. *Id.* at 756 n.7. That court observed that if parties take these steps, "subsequent claims of ineffective assistance of counsel in[volving] the defendant's decision to reject the offer are likely to fail unless the record establishes

that the information provided the defendant, as memorialized, was incomplete or inaccurate." *Id.*[9]

Requiring that defendants make crucial decisions about their own defense on the record, or that they be advised of critical information on the record, is not a new or radical innovation but a logical extension of current practice. For example, since 1969 this Court has required that the record must reflect that a guilty plea was entered knowingly and voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969) ("What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence."). The Federal Rules of Criminal Procedure and many state jurisdictions also require judges to develop the basis of a guilty plea on the record. Fed. R. Crim. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."); *see, e.g.*, *Watt v. State*, 420 S.E.2d 769, 770 (Ga. Ct. App. 1992) ("[T]he record as a whole must show that the defendant understood the rights he was waiving and that the plea was entered voluntarily ... ."); *People v. Lopez*, 525 N.E.2d 5, 7 (N.Y. 1988) (requiring defendant to

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[9] A Florida state judge has similarly advocated for all plea offers to appear on the record. Hon. Anthony K. Black (Judge, 13th Judicial Circuit) & Susan S. Matthey (senior staff attorney of the 13th Judicial Circuit), *Advice to the Criminal Bar: Preparing Effectively for Allegations of Ineffectiveness*, 82 Fla. B.J. 49, 50 (May 2008) ("[I]f the record reflects when plea offers are conveyed and rejected, such will allow for a summary denial of allegations of ineffective assistance of counsel for failure to convey a plea offer.").

describe the circumstances of the commission of the crime and holding that where "factual recitation negates an essential element of the crime pleaded to, the court may not accept the plea without making further inquiry to ensure that defendant understands the nature of the charge and that the plea is intelligently entered"); *see also Santobello*, 404 U.S. at 261 ("[Federal Rule of Criminal Procedure] 11, governing pleas in federal courts, now makes clear that the sentencing judge must develop, on *the record*, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge.").

A ruling in respondents' favor should incentivize prosecutors to take proactive steps toward ensuring that defendants are fully informed of any plea offer by, at a minimum, advising defendants of the terms of any plea offer on the record in open court. Providing incentives for compliance with such procedures (and for proactive steps by the prosecution to ensure communication of an offer even in the absence of state-mandated procedures) ultimately inures to the benefit of both defendants and prosecutors, as the prosecution should have a keen interest in resolving criminal charges, if possible, on terms that the State believes fairly serve the interests of justice.

When the State offers a plea, the offer reflects the State's judgment that the interests of justice and law enforcement are adequately served by that offer. Almost by definition, then, a higher sentence is overly punitive in the circumstances, by the State's own calculus. Of course, where a defendant makes a fully informed decision to reject a plea offer and go to trial, it is only reasonable and fair that acceptance of a later

offer (if any), or disposition without a plea deal, result in a harsher sentence. There must be some incentive to avoid imposing costs on the State to prepare for and try the case. But when a defendant's "rejection" is simply the result of a failure of defense counsel to communicate the offer, or the result of patently deficient advice concerning the offense with which the defendant is charged, the interests of justice are not served by over-punishment.

CONCLUSION

This Court should hold that a defendant who demonstrates a reasonable probability that he would have accepted a pending plea offer for a lesser sentence, but for counsel's unprofessional errors, suffers prejudice for Sixth Amendment purposes. This Court should defer to the courts of the State of Missouri as to the appropriate remedy for defendant Frye's constitutional injury.

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STATE OF MISSOURI,
Petitioner,

v.

GALIN E. FRYE,
Respondent.

ON WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS,
WESTERN DISTRICT

BRIEF OF AMICI CURIAE CONNECTICUT AND 28 OTHER STATES IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I. Contrary to the holding in Hill v. Lockhart, 474 U.S. 52 (1985) – which held that a defendant must allege that, but for counsel's error, the defendant would have gone to trial – can a defendant who validly pleads guilty successfully assert a claim of ineffective assistance of counsel by alleging instead that, but for counsel's error in failing to communicate a plea offer, he would have pleaded guilty with more favorable terms?

II. What, remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

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INTEREST OF THE *AMICI*

The *amici* states have a compelling interest in the finality of convictions emanating from their courts, and defending these presumptively valid judgments against post-conviction claims of ineffective assistance. They also have an interest in the finality of convictions resulting from pleas of guilty. They therefore have a strong interest in the proper application of the law governing claims that guilty plea convictions should be overturned due to ineffective assistance of counsel. Thus, the *amici* states have a substantial interest in this Court's determination of whether the states must provide relief to, and a remedy for, a criminal defendant who has validly pleaded guilty, though ignorant of a "more favorable" plea bargain about which his attorney never informed him.[1]

SUMMARY OF THE ARGUMENT

In this case, the Missouri Court of Appeals for the Western District ("The Missouri Court") ruled that a criminal defendant, convicted after entering a guilty plea, is entitled to relief when he later discovers that his attorney failed to convey to him an earlier, more favorable, plea offer made at the State's discretion.[2]

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[1] Rule 37(4) permits the Attorneys General to file amicus curiae briefs without permission of the parties. In Connecticut, the Chief State's Attorney serves as the equivalent of the Attorney General for criminal matters. Conn. Const. Amd. XXIII; Conn. Gen. Stat. § 51-278(c).

[2] Throughout this brief, "plea offer" refers to an offer by the State to recommend to the trial court pre-trial disposition under certain

be set aside turns on whether, absent counsel's errors, the defendant would have insisted on his right to a fair trial. Whether earlier errors by counsel—in plea negotiations or otherwise—might have secured a more favorable agreement is irrelevant to that question.

II. THE ABSENCE OF AN APPROPRIATE REMEDY CONFIRMS THAT RESPONDENT DID NOT SUFFER AN INJURY COGNIZABLE UNDER THE SIXTH AMENDMENT

This Court has held that "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Unlike a normal *Strickland* case, this case admits of no appropriate remedy for counsel's failure to communicate the prosecutor's plea offer to respondent. The court of appeals' primary solution does not remedy respondent's claimed harm: a lost opportunity to accept a prosecution plea offer and (perhaps) plead guilty to a misdemeanor DWR charge pursuant to a plea agreement. The court of appeals' suggestion that the parties might decide on their own to negotiate a plea agreement likewise fails to provide an appropriate remedy. Other remedial options adopted in other contexts are equally unsatisfactory. In the end, the unavailability of an appropriately tailored remedy underscores the conclusion that respondent did not suffer a cognizable Sixth Amendment injury.

1. The court of appeals ordered respondent's guilty plea withdrawn and remanded the case to allow respondent to choose between standing trial on the felony DWR charge or entering a guilty plea on that charge without the benefit of a plea agreement. J.A. 79-80. The

court also suggested that the parties might decide to negotiate a plea agreement and that respondent might thereafter enter a guilty plea "to such other amended charge as the State may deem it appropriate to offer." J.A. 79. Neither option provides a remedy appropriately tailored to redress respondent's claimed injury.

a. Respondent pleaded guilty to the State's felony DWR charge. He now argues that, but for his counsel's error, he would have had the opportunity to plead guilty to the same DWR offense charged as a misdemeanor. A remedy that erases *any* finding of guilt cannot logically redress respondent's constitutional claim that he lost an opportunity to *admit* his guilt to a lesser charge. Yet that is precisely the remedy underlying the court of appeals' decision to give respondent the choice between a trial on the State's felony charge and pleading guilty to that charge.

If petitioner chooses a trial, the trial would produce either an acquittal or no remedy at all for respondent's alleged injury. An acquittal would be a windfall entirely untethered from respondent's own claim that he would have pleaded guilty but for his counsel's error. And if respondent were found guilty after trial, there is no reason to think that his sentence would be any lower than the sentence he already received when he *admitted* responsibility with a guilty plea.

The alternative of pleading guilty to a felony without the benefit of a plea agreement is similarly deficient. It simply puts respondent in the position he was in *after* his counsel's error. And, when confronted with the choice between trial and an open guilty plea, respondent pleaded guilty. It would be a waste of judicial resources to give respondent that same choice again.

b. Nor is the court of appeals' remedy warranted to encourage the State to offer respondent a new plea agreement. The fundamental flaw in that approach is that it is impossible to restore the *status quo ante*. The essence of plea bargaining is "mutuality of advantage," *Brady*, 397 U.S. at 752, and vacating respondent's conviction "cannot recreate the balance of risks and incentives on both sides that [previously] existed." *State* v. *Greuber*, 165 P.3d 1185, 1190 (Utah 2007) (quoting *Commonwealth* v. *Mahar*, 809 N.E.2d 989, 1001 (Mass. 2004) (Sosman, J., concurring)).

The decision to enter a plea bargain is normally driven by a number of factors, including (1) the uncertain prospects of a conviction, (2) the unknown severity of the criminal sentence, (3) the costs associated with trial, and (4) other promises that might be made in an agreement. New negotiations would unfairly provide the defendant with the advantages of time: important witnesses die, disappear, or become unavailable, or their memories fade. See *Premo*, 131 S. Ct. at 745-746. The risk of acquittal, moreover, is a key element in the State's plea-bargaining calculus and, to preserve the State's incentive to avoid that risk, a court must allow the possibility for acquittal, even though doing so risks the very windfall discussed above.

Other distortions in the parties' plea-bargaining incentives are often equally significant. After a defendant has pleaded guilty and been sentenced, the parties acquire important insight into the severity of the sentence that would result if they were to negotiate a new plea. For instance, the prosecutor's original plea offer here suggested the alternatives of (1) a felony plea for which the State would recommend a three-year term of imprisonment, defer to the court on probation, and request

AMICUS CURIAE BRIEF

Nos. 10-209 and 10-444

In the Supreme Court of the United States

BLAINE LAFLER,
Petitioner,
v.
ANTHONY COOPER,
Respondent.

STATE OF MISSOURI,
Petitioner,
v.
GALIN EDWARD FRYE,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit and to the Court of Appeals of Missouri (Western District)

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Where defense counsel's deficient performance causes the defendant to lose the benefit of a favorable plea agreement that the defendant would have accepted had he been competently advised, has the defendant been deprived of the effective assistance of counsel guaranteed by the Sixth Amendment?

2. What remedy, if any, should be provided for ineffective assistance of counsel during plea negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

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INTEREST OF THE ABA AS *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of Respondents. The ABA requests that the Court consider the consensus views embodied in the ABA ethical rules and criminal justice standards in deciding whether a criminal defendant is entitled to a remedy where his lawyer's constitutionally deficient performance causes him to lose the benefit of a favorable plea proposal.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members span all 50 states and other jurisdictions, and include attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutor and public defender offices, as well as judges, legislators, law professors, and law students.[2]

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in the preparation of this brief, or in the adoption or endorsement of the positions in this brief.

Since its inception, and as one of the cornerstones of its mission, the ABA has actively sought to improve the quality of American legal services by "[p]romot[ing] competence, ethical conduct and professionalism."[3] One of these efforts is the development and adoption of professional standards to serve as models for the regulation of lawyers by the individual states. Its first standards, the CANONS OF PROFESSIONAL ETHICS, were adopted in 1908, and have been continuously amended and updated over the years. They are now published as the ABA MODEL RULES OF PROFESSIONAL CONDUCT.[4]

Another of these efforts has been the development of the ABA STANDARDS FOR CRIMINAL JUSTICE. Begun in 1964 under the aegis of then-ABA President (and later Justice) Lewis Powell, and refined over the last forty years, the Standards represent a considered collection of "best practices" based on the consensus views of a broad array of professionals involved in the

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[3] ABA Mission and Association Goals, *available at* http://www.abanet.org/about/goals.html.

[4] The ABA MODEL RULES OF PROFESSIONAL CONDUCT are developed through the efforts of ABA members and national, state and local bar organizations, and are subjected to review by academicians, practicing lawyers and the judiciary. Before they become official ABA policy they must be approved by vote of the ABA House of Delegates (HOD), which is composed of more than 500 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. Information on the HOD is available at http://www.americanbar.org/groups/leadership/house_of_delegates.html.

criminal justice system.[5] The Standards do not purport to establish the constitutional baseline for effective assistance of counsel. *See Rompilla v. Beard*, 545 U.S. 374, 399 (2005) (Kennedy, J., dissenting). They have, however, been recognized by this Court as "valuable measures of the prevailing professional norms of effective representation." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010); *see also Strickland v. Washington*, 466 U.S. 668, 688 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what [performance of counsel] is reasonable."). As relevant to the cases before the Court, the Standards require criminal defense counsel to promptly communicate any plea offer to the client, and to provide the full and accurate advice necessary to permit the client to make an informed decision regarding any plea offer. The Standards also provide that, on finding that a defendant lost the benefit of an advantageous plea offer because of constitutionally ineffective assistance of counsel, the court should have broad discretion in fashioning a remedy that will place the defendant insofar as possible in the position he or

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[5] The ABA CRIMINAL JUSTICE STANDARDS are developed through the work of broadly representative task forces made up of prosecutors, judges, defense lawyers, academics, the public and other groups that may have a special interest in the subject, as well as by the diverse membership of the ABA. They, too, must be approved by vote of the ABA HOD before they become official ABA policy. A complete set of the Standards, which are divided into volumes by topical area, and a history of their development, are available at http://www.americanbar.org/groups/criminal_justice/policy/standards.html; *see also* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 14-15 (Winter 2009) (describing the process by which the Standards are developed and promulgated).

she would have been in had the constitutional violation not occurred.

SUMMARY OF ARGUMENT

This Court has recognized that American Bar Association standards are valuable measures of prevailing professional norms of effective representation for purposes of the Sixth Amendment. A lawyer's duties under the ABA ethical standards include providing competent representation to a client and communicating with the client concerning matters of significance to the client. These duties are particularly important when a criminal defendant is considering entering into an agreement to plead guilty. As elaborated in the ABA criminal justice standards, the lawyer's duties at the plea stage include promptly informing the client of all significant plea proposals made by the prosecutor, and fully explaining the choices available to the client after conducting an investigation and analysis of all pertinent issues of fact and law. When defense counsel fails to convey a plea offer to the client, or gives the client considering a guilty plea materially inaccurate advice about the charges and the burden of proof, defense counsel's performance falls below the established standard of reasonableness.

Where the accused has been denied the effective assistance of counsel because of deficient representation in the plea process, a subsequent fair trial does not remedy the initial constitutional error. In those rare cases where a defendant loses the benefit of an advantageous plea because of constitutionally ineffective counsel, the court should have discretion to fashion a remedy that will place the defendant insofar

as possible in the position he or she would have been in had the right to effective assistance not been violated. The fact that nearly 95% of criminal convictions now result from guilty pleas makes it all the more important that defendants considering a guilty plea should have competent counsel. In some cases, the circumstances will dictate that the appropriate remedy for a constitutional violation is to vacate the conviction and allow the government to re-prosecute the case. In this event, the government may choose to reopen plea negotiations. In other cases, including where re-prosecution is not feasible, the appropriate remedy may be to afford the defendant the benefit of the offer lost through constitutionally deficient counsel.

ARGUMENT

I. PLEA NEGOTIATIONS ARE A CRITICAL STAGE OF THE CRIMINAL PROCESS IN WHICH A DEFENDANT MUST HAVE COMPETENT COUNSEL.

A. ABA Standards Emphasize the Importance of Competent Counsel at the Plea Stage.

A lawyer's duty to represent a client competently in the pretrial stages of a criminal case, including in plea negotiations, is recognized in the ABA MODEL RULES OF PROFESSIONAL CONDUCT ("Model Rules" or "R.") and elaborated in the ABA STANDARDS FOR CRIMINAL JUSTICE. Under the Model Rules – and as this Court has long recognized, *see, e.g., Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966) – the decision to plead guilty is considered so vital that it is specifically identified as one of the very few that cannot be made by the lawyer

alone. *See* R. 1.2(a) (a lawyer "must abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify"); *see also* R. 1.4(a)(1) (a lawyer must "promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these rules");[6] R 1.4(b) (a lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions"); *accord* Standard 4-5.2(a) of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION (3d ed. 1993) (hereinafter "Defense Function Standards")[7] (the decision whether to plead and what plea agreement to accept are "ultimately for the accused . . . after full consultation with counsel.").[8] Model Rule 1.2(a) and Defense Function Standard 4-5.2(a) give effect to an accused individual's right to make decisions regarding matters that are "fundamental" or "substantive" because they are highly personal and derive from constitutional guarantees. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (decisions about fundamental

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[6] The first example in the commentary to Rule 1.4 of this duty to inform the client is that "a lawyer who receives from opposing counsel . . . a proffered plea bargain in a criminal case must promptly inform the client of its substance." R. 1.4, cmt. 2.

[7] Of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION, only the Defense Function Standards are discussed in this brief.

[8] The commentary to Defense Function Standard 4-5.2 explains that "because of the fundamental nature of decisions such as these, so crucial to the accused's fate, the accused must make the decisions himself or herself."

matters, including decision to plead guilty, are reserved for the defendant).

Defense counsel's failure to communicate a plea offer, and to fully and accurately explain the choices facing the client at this critical stage of the case, effectively deprives the client of the right to knowingly and intelligently make a decision that will predictably have a dramatic effect on his or her future. *See* Standard 14-3.2(a) of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY (3d. ed. 1999) (hereinafter "Pleas of Guilty Standards") (defense counsel "should keep the defendant advised of developments arising out of plea discussions conducted with the prosecuting attorney, and should promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney"); *see also* Defense Function Standard 4-6.2(b) (counsel should "promptly communicate and explain to the accused all significant plea proposals made by the prosecutor").[9] The ABA Criminal Justice Standards have contained

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[9] The commentary to Defense Function Standard 4-6.2 explains that:

> Because plea discussions are usually held without the accused being present, the lawyer has the duty to communicate fully to the client the substance of the discussions. It is important that the accused be informed of proposals made by the prosecutor; the accused, not the lawyer, has the right to decide on prosecution proposals, even when a proposal is one that the lawyer would not approve. If the accused's choice on the question of a guilty plea is to be an informed one, the accused must act with full awareness of the alternatives, including any that arise from proposals made by the prosecutor.

Defense Function Standard 4-6.2(b) cmt.

these requirements for more than thirty years,[10] and they have been cited by numerous courts both before and after *Strickland* as establishing the norm of effective representation in the guilty plea context.[11]

ABA standards also require that a lawyer must fully explain and advise about the choices available to the client considering a plea offer, after conducting an appropriate investigation and analysis of all pertinent

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[10] *See* Standard 4-6.2(a) of the ABA STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION (2d ed. 1979); *see also* Standards 14-3.2(a) and (b) of the ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY (2d ed. 1979). The ethical duty to convey and advise about a plea offer was also contained in the 1969 MODEL CODE OF PROFESSIONAL RESPONSIBILITY that antedated the Model Rules. *See, e.g.*, Ethical Consideration 7-7 ("A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken"); *see also State v. James*, 739 P.2d 1161, 1166-67 (Wash. Ct. App. 1987); *Hanzelka v. State*, 682 S.W.2d 385, 387 (Tex. Ct. App. 1984).

[11] *See, e.g., Davie v. State*, 675 S.E.2d 416, 420 (S.C. 2009); *Jiminez v. State*, 144 P.3d 903, 906 (Okla. Crim. App. 2006); *People v. Perry*, 68 P.3d 472, 477 (Colo. Ct. App. 2002); *State v. Donald*, 10 P.3d 1193, 1198 (Ariz. Ct. App. 2000); *Cottle v. State*, 733 So. 2d 963, 964-65 (Fla. 1999); *Becton v. Hun*, 516 S.E.2d 762, 766 (W. Va. 1999); *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994); *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994); *People v. Alexander*, 518 N.Y.S.2d 872, 879 (N.Y. Sup. Ct. 1987); *Lloyd v. State*, 373 S.E.2d 1, 2-3 (Ga. 1988); *James*, 739 P.2d at 1166-67; *Johnson v. Duckworth*, 793 F.2d 898, 901-902 (7th Cir. 1986); *Hanzelka*, 682 S.W.2d at 387; *State v. Simmons*, 309 S.E.2d 493, 497 (N.C. Ct. App. 1983); *People v. Ferguson*, 413 N.E.2d 135, 138 (Ill. App. Ct. 1980); *Lyles v. State*, 382 N.E.2d 991, 993-94 (Ind. Ct. App. 1978).

issues of fact and law. Pleas of Guilty Standard 14-3.2(b) provides that "to aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and considerations deemed important by defense counsel or the defendant in reaching a decision." The commentary to this Standard explains that "[t]his is a critical standard because the system relies, at heart, on defense counsel to ensure that a defendant's guilty plea is truly knowing and voluntary and is entered in his or her best interests." *See also* commentary to Defense Function Standard 4-6.1(b) ("Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including analysis of controlling law and the evidence likely to be introduced at trial."). The commentary to Pleas of Guilty Standard 14-3.2 contrasts defense counsel's advisory role with that of the court:

> Although the court must inquire into the defendant's understanding of the possible consequences at the time the plea is received . . ., this inquiry is not, of course, any substitute for advice by counsel. The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations that may not be covered by the judge in his or her admonition. A defendant needs to know, for

> example, the probability of conviction in the event of trial.

Pleas of Guilty Standard 14-3.2 cmt. The Pleas of Guilty Standards also caution the court not to accept a plea "where it appears the defendant has not had the effective assistance of counsel." *See* Pleas of Guilty Standard 14-1.4(d).[12] All of the Standards discussed above were in effect and reflected well-established norms many years before the defense attorneys' actions in these cases. *Compare Bobby v. Van Hook*, 130 S. Ct. 13, 16-17 (2009) (per curiam).[13]

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[12] The commentary to Pleas of Guilty Standard 14-1.4 notes that a similar provision was contained in the UNIFORM RULES OF CRIMINAL PROCEDURE, promulgated in 1987. *See* UNIF. R. CRIM. P. 444(b)(2) (1987) (a court "may not accept the plea if it appears that the defendant has not had the effective assistance of counsel.").

[13] In *Bobby*, in considering whether counsel's performance fell "below an objective standard of reasonableness" in light of "prevailing professional norms," the Court distinguished the detailed 2003 ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES ("2003 ABA Guidelines"), promulgated in 2003 long after the defendant's trial, from the more general ABA standard in effect in 1985. *See* 130 S. Ct. at 17 (quoting from the ABA STANDARDS FOR THE DEFENSE FUNCTION (2d ed. 1979)). The Court criticized the court of appeals for interpreting the 2003 ABA Guidelines as "inexorable commands," as opposed to "'only guides' to what reasonableness means," *id.*, and reserved the possibility that it might "accept the legitimacy" of a less detailed set of guidelines that did not "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.* at 17 n.1. As argued *infra*, the specific ways in which counsel's performance in these

B. This Court's Recent Sixth Amendment Jurisprudence Recognizes the Importance of Competent Counsel at the Plea Stage.

This Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla*, 130 S. Ct. at 1482, *citing Hill v. Lockhart*, 474 U.S. 52, 57 (1985), and *McMann v. Richardson*, 397 U.S. 759, 770–771 (1970). Until recently, however, a criminal defendant was protected in the plea negotiation process only against threats, misrepresentations, and bribes;[14] broken promises;[15] and a failure to disclose the "direct" or court-imposed consequences of conviction.[16] Counsel was expected to do no more than provide competent advice about the rights a defendant was forgoing by entering a guilty plea.[17] In *Padilla*, this Court

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two cases is claimed to have fallen short of an objective standard of reasonableness can in no way be described as "tactical decisions." *See infra*, Part II.A.

[14] *Brady v. United States*, 397 U.S. 742, 755 (1970) (citing with approval *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on confession of error on other grounds*, 356 U.S. 26 (1958)).

[15] *Santobello v. New York*, 404 U.S. 257, 261-62 (1971).

[16] *Brady*, 397 U.S. at 755.

[17] *McMann*, 397 U.S. at 769-71; *see also Libretti v. United States*, 516 U.S. 29, 50-51 (1995) ("Apart from the small class of rights that require specific advice from the court under Rule 11(c), it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea

recognized that counsel's Sixth Amendment duty to advise the client about the consequences of pleading guilty is frequently broader and more subtle. In holding that a lawyer should have affirmatively advised his client about the deportation consequences of pleading guilty, the *Padilla* Court noted that plea negotiation has become the predominant way of resolving criminal cases. 130 S. Ct. at 1485 n.13 (noting that nearly 95% of criminal convictions result from pleas).[18] The overwhelming reliance on disposition by plea in today's justice system has made it essential that defendants considering a guilty plea should not be "left to the 'mercies of incompetent

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would forgo."); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 29 CAL. L. REV. __ (forthcoming), University of Pennsylvania Public Law and Legal Theory Research Paper Series 40, available at http://ssrn.com/abstract=1694111 ("Plea bargaining, [the Court] assumed, was sufficiently protected by the option of going to trial and by plea colloquies that explained the trial procedures defendants were waiving.").

[18] More recent studies confirm the 2003 data cited by the Court in *Padilla*. *See* Bureau of Justice Statistics Bulletin, May 2010, NCJ 228944 (reporting that in 2006, in state courts in the nation's 75 largest counties, 68% of felony defendants were eventually convicted, and 95% of those convictions were by a guilty plea); *see also Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009) ("only a small fraction of . . . cases actually proceed to trial," noting the 5% figure provided in the Brief for Law Professors as *Amici Curiae* 7-8); Stephanos Bibas, *The Myth of the Fully Informed Rational Actor*, 30 ST. LOUIS PUB. L. REV. __ (2011) (forthcoming, available from the ABA) (plea bargaining is "no longer a negligible exception to the norm of trials; it is the norm").

counsel.'" *Id.* at 1486, *quoting McMann*, 397 U.S. at 771.[19]

At the same time, this Court has been understandably reluctant to second-guess strategic decisions made by counsel in the plea bargaining process. In *Premo v. Moore*, 131 S. Ct. 733, 741 (2011), the Court observed that plea agreements are "the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks." Thus, the Court concluded that the substantive standard for reviewing counsel's strategic choices must be whether there was "manifest deficiency in light of information then available to counsel." *Id.*

In the cases presently before the Court, however, the claimed deficiency in counsel's performance did not involve a strategic choice that turned out badly for the client. Rather, as discussed in the following section, the failure to convey a plea offer and the provision of plainly erroneous advice about the charges and standard of proof, like *Padilla*'s failure to warn about deportation consequences, fell below "an objective

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[19] Professor Ronald Wright has concluded, based on a study of plea and conviction statistics across the second half of the twentieth century, that federal defendants who would otherwise have been acquitted at trial have increasingly pleaded guilty instead. He attributes this in substantial part to increased prosecutorial power, and prosecutors' ability to threaten large penalties for going to trial and to promise large rewards for pleading guilty. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 84-86, 100-12, 129-37, 150-54 (2005).

standard of reasonableness" under "prevailing professional norms." *Strickland*, 466 U.S. at 688.

II. WHERE DEFENSE COUNSEL'S FAILURE TO CONVEY A PLEA OFFER OR ERRONEOUS ADVICE ABOUT LEGAL STANDARDS CAUSES THE CLIENT TO LOSE THE BENEFIT OF A FAVORABLE PLEA, COUNSEL'S PERFORMANCE SHOULD BE DEEMED CONSTITUTIONALLY DEFICIENT.

A. A Lawyer is Required Under Applicable Professional Norms to Communicate With the Client About a Plea Proposal, and to Advise the Client Competently Respecting the Proposal.

A lawyer's professional obligation to represent a client competently and diligently, and to communicate with the client about significant developments in the case, has been part of the American Bar Association's ethical canons for over a century.[20] These ethical

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[20] *See* ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969), EC 7-4 through 7-7; ABA CANONS OF PROFESSIONAL ETHICS, Canon 8 (1908). As relevant here, Canon 8 provided:

> A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reasons of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever

duties, which form the basis for rules governing the professional conduct of lawyers in almost every state, have a particular relevance in the context of plea discussions. As discussed in Part I, these rules, together with the ABA CRIMINAL JUSTICE STANDARDS, require that a lawyer communicate with the client about plea offers and advise the client candidly and competently in order to enable the client to make an informed decision respecting the plea. *See also* Defense Function Standard 4-4.1(a) (defense counsel is obligated to investigate "facts relevant to the merits of the case and the penalty in the event of conviction"); Defense Function Standard 4-5.1(a) ("After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.").

In the instant cases, the findings of the lower courts respecting defense counsel's performance amply demonstrate deficient performance when measured against the standards of professional competence discussed above. In No. 10-444, counsel was found to have failed completely to communicate to his client an evidently advantageous plea offer, contrary to ABA Model Rules 1.2(a) and 1.4(b), and Defense Function Standards 4-5.2(a) and 4-6.2(b). In No. 10-209, defense counsel was found to have failed to provide his client considering a guilty plea offer with accurate advice about the elements of the charges and the burden of proof, in violation of ABA Model Rules 1.1 and 1.4(b), Defense Function Standards 4-4.1(a), 4-5.1(a) and 4-

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the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

6.1(b), and Pleas of Guilty Standard 14-3.2(b). These deficiencies were not related to strategic choices by counsel, but were failures to comply with clearly stated and generally accepted objective standards of professional competence. *Cf. Premo*, 131 S. Ct. at 741. That is, these are not cases in which the deficiencies in counsel's action can be defended as a tactical decision or where deference should otherwise have been accorded to counsel's judgment. *See Strickland*, 466 U.S. at 689.

B. Where Deficient Performance Causes a Defendant to Lose the Benefit of a Favorable Plea Proposal, the Defendant Has Been Prejudiced, and Thus Deprived of the Effective Assistance of Counsel to Which the Sixth Amendment Entitles Him.

1. The prejudice analysis in *Hill v. Lockhart* is inapposite where a defendant does not take a plea offer because of deficient counsel.

Prejudice is established for purposes of the Sixth Amendment where there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 691; *accord Hill v. Lockhart*, 474 U.S. 52, 57 (1985). Petitioners and the United States as *amicus curiae* in support of Petitioners have argued that the formulation of the prejudice standard in *Hill* altered the *Strickland* test whenever ineffective assistance is alleged during the plea process, so that a defendant must show that but for his counsel's deficient performance he "would have pleaded not guilty and insisted on going to trial." *See Hill*, 474

U.S. at 59. By this reasoning, a defendant who rejects a plea offer and goes to trial can never meet the constitutional test of ineffective assistance regarding anything that occurred during the negotiation stage. Nor, presumably, can a defendant who subsequently accepts a less favorable plea offer, since he too will be unable to show that, but for his counsel's default, he "would have pleaded not guilty." *See id.*

Rather than *Hill* changing *Strickland*'s prejudice standard, however, the language on which Petitioners rely ("would have . . . insisted on going to trial") simply spells out what the defendant in *that* case needed to show to establish prejudice in the plea process, since he had in fact accepted a plea offer and therefore had given up his right to go to trial. The prejudice test in *Hill*, a case involving counsel's failure to warn about parole eligibility, "focuse[d] on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.*; *see also Padilla*, 130 S. Ct at 1485 ("to obtain relief on this type of claim [of failure to warn about deportation], a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances"); Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 HOW. L. J. 693, 712-719 (2011) (arguing that *Padilla* marks a rejection of a trial-outcome test of prejudice for ineffective assistance in the plea process).

These cases are distinguishable from *Premo v. Moore*, *supra*, where this Court noted the potential for eroding principles of acceptance of responsibility and acknowledgment of guilt "if a guilty plea is too easily set aside based on facts and circumstances not apparent to a competent attorney when actions and

advice leading to the plea took place." 131 S. Ct. at 741. In *Premo*, the Court concluded that counsel's failure to seek suppression of the defendant's confession before discussing a plea could reasonably be considered a "strategic" choice that courts should be reluctant to second-guess. *Id.* at 743. By contrast, a complete failure to convey an advantageous plea offer (No. 10-444) and plainly erroneous advice about the standard for proving guilt (No. 10-209) do not involve any "facts and circumstances not apparent to a competent attorney," and could not conceivably be considered part of a reasonable defense strategy.

2. The fact that respondents were ultimately convicted and sentenced pursuant to constitutionally adequate procedures does not nullify the prejudice that infected the earlier plea stage.

If Sixth Amendment prejudice can be established only where a defendant does not go to trial, then a defendant who goes to trial (or who accepts a less favorable plea offer) would be foreclosed from claiming ineffective assistance at an earlier stage of the case. But a constitutional violation in the pre-trial stages of a criminal case is not shielded from review simply because the trial portion of the case proceeds without additional error. For example, this Court held in *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1977), that ineffective assistance of counsel in relation to pre-trial investigation and in failing to file a motion to suppress evidence can itself require relief, even if the resulting trial is otherwise basically fair and counsel's performance is otherwise unobjectionable. This Court has recently reaffirmed the principle that even though

the purpose of the rights set forth in the Sixth Amendment is to ensure a fair trial, "it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2716 (2011). If the defendant's Sixth Amendment rights are violated, "[n]o additional showing of prejudice is required to make the violation 'complete.'" *Id.*

In the present cases, the courts below found that if respondents had been properly advised of the existence and import of the plea offers, they would have accepted them, so that the further "constitutionally adequate" proceedings would not have occurred. While a finding of prejudice in this context does not settle the question of appropriate remedy,[21] deficient representation at the plea stage is not vitiated simply because later proceedings in the case were free from additional taint.

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[21] The Solicitor General argues in support of Petitioners that "the absence of any coherent remedy for a forgone plea confirms that respondent suffered no Sixth Amendment prejudice." *See* Brief for the United States as *Amicus Curiae* at 24, 32. But this odd inversion of the equitable principle "*ubi jus ibi remedium*" takes no account of the many courts that have over the years found a way to fashion remedies for constitutional violations at the pretrial stages of a case. *See, e.g.*, David A. Perez, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532 (2011), and cases cited *infra* at p. 24. The fact that this exercise is sometimes difficult and the result usually imperfect, as the Missouri court in 10-444 acknowledged, *Frye v. State*, 311 S.W.3d 350, 360 (Mo. Ct. App. 2010), should not be a reason for abandoning the effort altogether, much less for concluding, as the Solicitor General recommends, that there has been no violation at all. The Missouri court specifically rejected a similar argument, noting that "[w]e do not believe the determination of prejudice can be bootstrapped in this fashion." *Id.*

III. A POST-CONVICTION COURT SHOULD HAVE BROAD DISCRETION TO FASHION A REMEDY WHERE A DEFENDANT LOSES THE BENEFIT OF AN ADVANTAGEOUS PLEA BECAUSE OF CONSTITUTIONALLY INEFFECTIVE COUNSEL.

Longstanding ABA policy provides that where a court determines in post-conviction proceedings that a defendant lost the benefit of an advantageous plea offer because of constitutionally ineffective counsel, the court should have broad discretion to fashion a remedy. *See* Standard 22-2.1 of the volume ABA STANDARDS FOR CRIMINAL JUSTICE, POST-CONVICTION REMEDIES (2d ed. 1978) (hereinafter "Post-Conviction Remedies Standards") ("[a] post-conviction proceeding should be sufficiently broad to provide relief [for meritorious claims] that the conviction was obtained or sentence imposed in violation of the Constitution"). Post-Conviction Remedies Standard 22-4.7(a)(ii) identifies the kinds of relief a post-conviction court should be able to order when it finds error "in the trial or pretrial stages of the process leading to conviction," noting that "the kind of affirmative relief ordered will vary with the nature of the meritorious contention." Post-Conviction Remedies Standard 22-4.7(a)(ii) specifies that if further prosecution is foreclosed, "the order of the court should provide for immediate discharge from custody." *Id.* If there is no bar to further prosecution,

> the order of the court should provide for discharge from custody within a stated period of time unless, within that time, the state takes the necessary steps to commit the applicant to

> custody pending reindictment, rearraignment, retrial, or resentence, as the case may be. In some instances, only a declaration of invalidity of the prior conviction may be required.

Id. Under these Standards, a defendant who has been harmed by constitutionally deficient counsel in pre-trial proceedings should be placed insofar as possible in the position he or she would have been in had the constitutional violation not occurred. *See also* Pleas of Guilty Standard 14-2.1(b)(i)(A) (a defendant denied effective assistance of counsel at the plea stage should be permitted to withdraw a plea even after a criminal sentence has been imposed).

Consistent with this Court's general instruction that the remedy for a Sixth Amendment violation "should be tailored to the injury suffered and should not unnecessarily infringe on competing interests," *United States v. Morrison*, 449 U.S. 361, 364 (1981), the courts have fashioned a variety of remedies where a defendant has been prejudiced by counsel's deficient performance by counsel at the plea negotiation stage. In some cases where a constitutional violation caused the defendant to forego a favorable plea offer, the court has vacated the conviction and given the government an opportunity to re-prosecute the case. *See* Perez, *supra*, 120 YALE L.J. at 1554-60. In other cases, particularly where re-prosecution is impracticable or inappropriate, the court has declined to vacate the conviction and ordered a remedy sometimes styled as "specific performance" of the lost plea deal. *Id.* at 1548-50. The court in No. 10-444 appears to have elected the first approach, while the court in No. 10-209 chose the second. Each court appears to have fashioned a remedy reasonably calculated to place the

defendant insofar as possible in the position he would have been in had the right to effective assistance not been violated.

The key to the question of remedy in cases where a defendant has lost the benefit of a favorable plea offer because of counsel's deficient performance, the ABA suggests, is to recognize that the purpose of plea negotiations is for "the defense and prosecution to reach agreements that . . . satisfy the interests of both parties." *Padilla*, 130 S. Ct. at 1486. The prevalence of plea bargaining in today's justice system guarantees that almost every criminal prosecution is susceptible to more than one mutually acceptable outcome. Similarly, the role of the post-conviction court in fashioning a remedy for constitutional violations in the plea process should be to approximate a just outcome in light of present circumstances. This may include consideration of a plea agreement that was on the table (but not communicated or adequately explained to the defendant) or modifications that were reasonably probable through further negotiation. Where a court concludes that it is impracticable for the government to retry the case, a remedy may be one that approximates the probable outcome had there been no constitutional violation.

The remedy should be one reasonably calculated to leave the defendant no worse off – but not necessarily better off – than he would have been had counsel performed effectively in the first place. Since the State bears responsibility under the Sixth and Fourteenth Amendments for ensuring that each defendant enjoys effective assistance of counsel, *see Cuyler v. Sullivan*, 446 U.S. 335, 343-44 (1980), any prejudice to the State from undoing a constitutional harm of this kind is

simply an inevitable cost, once the constitutional harm is identified, of compliance with the Constitution that should be given little weight.

Petitioner in No. 10-209 contends that providing a remedy for Sixth Amendment violations resulting in the loss of an advantageous plea "allows a defendant to play with house money." Brief for Petitioner Lafler at 20. This colorful but cynical description of how a defendant can "take his chances at a fair trial" and still "demand and receive the benefit of the forgone plea," would require that defense lawyers collude with their clients to "game the system," and assumes that courts cannot detect and punish any such unethical conduct if it should occur. Petitioner in No. 10-444 similarly warns that affirming the state court's judgment will encourage lawyers to engage in unethical conduct: *e.g.*, "a shrewd defense attorney seeking the best possible outcome for the client might strategically allow a plea offer to expire without communicating it to the defendant, knowing that the expired offer will act as a sort of insurance policy against worse results at trial." Brief for Petitioner State of Missouri at 36.

This Court should reject Petitioners' invitation to base a constitutional rule on an assumption that members of the Bar will choose to violate their own ethical responsibilities and their states' rules of professional conduct. In doing so, counsel would first impose on the judicial system, their clients and themselves the increased costs and risks of going to trial, following which they would either have to commit perjury at the post-conviction hearing – if one were granted, which it seldom is – or confess at such a hearing to conduct that would warrant the imposition

of professional discipline.[22] *See* Model Rules, R. 1.4(a)(1); R. 3.3(a) (a lawyer "shall not knowingly . . . make a false statement of fact or law to a tribunal").

Further, a court considering whether counsel had performed to the required standard would weigh the testimony of those involved as it would weigh the testimony of any witness. And the court would consider the interest that any or all of them have in the outcome of such proceedings. *See, e.g., United States v. Day*, 969 F.2d 39, 46 n.9 (3d Cir. 1992). Several federal circuits have long conducted such proceedings. *See, e.g., Boria v. Keane*, 99 F.3d 492, 498-99 (2d Cir. 1996), *cert. denied*, 521 U.S. 1118 (1997); *Day*, 969 F.2d at 47; *Blaylock*, 20 F.3d at 1468-69; *Turner v. Tennessee*, 858 F. 2d 1201, 1208 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989). In addition, prosecutors can minimize the opportunity for unethical "gaming" of the system by placing a plea offer on the record in the presence of the defendant.[23]

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[22] The ABA suggests that Petitioners' position should be equally offensive if, instead, it were asserted that prosecutors would routinely lie in responding to post-conviction petitions of this kind by denying that a particular plea offer had been extended, when in fact it had.

[23] Such a procedure would also give the court an opportunity to inquire whether counsel has explained to the client the consequences of taking or not taking the plea offer. *See, e.g., Rivera-Longoria v. Slayton*, 242 P.3d 171, 174 (Ariz. Ct. App. 2010) (holding that under ARIZ. R. CRIM. P. 15.8 the prosecutor must place on the record a plea offer 30 days prior to withdrawing it). The *Rivera-Longoria* court explained that Rule 15.8 was enacted in response to the holding in *Donald*, 10 P.3d at 1205 (finding ineffective assistance based on counsel's failure to convey plea offer), and is "designed to protect a defendant's constitutional

Finally, the concern to "protect[] the finality of convictions," *Padilla*, 130 S. Ct. at 1485, whether obtained through a guilty plea, as in 10-444, or through a jury verdict, as in 10-209, is significant. However, whether constitutionally deficient lawyering has resulted in a plea that is accepted, as in *Hill* and *Padilla*, or is undelivered or rejected, as in these cases, "[s]urmounting *Strickland*'s high bar is never an easy task." *Id.* The concern that some frivolous or fraudulent motions may be filed must be balanced against the lack of remedy for violations of a defendant's constitutional right to effective assistance of counsel.

For these reasons, the Court should reject any suggestion that a defendant is entitled to no relief for constitutionally ineffective assistance of counsel that results in loss of an advantageous plea offer. Further, the question of remedy should be left to the discretion of post-conviction courts to fashion relief that is reasonably calculated to place the defendant insofar as

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right to effective assistance of counsel when considering a plea offer. . . [by ensuring that] if a plea offer is extended, the defendant will have all material information to make an informed decision." *Id.*; *see also* ARIZ. R. CRIM. P. 15.8 cmt. (stating that Rule 15.8 is designed "to enable the defendant to make an informed decision on the plea offer with the effective assistance of counsel"); *see also* Standard 19-2.3(a) of the ABA STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d ed. 2004) ("court [should] ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction," a "requirement [that] may be satisfied by confirming on the record that defense counsel's duty of advisement under Standard 14-3.2(f) has been discharged").

possible in the position he or she would have been in had the constitutional violation not occurred.

CONCLUSION

For the reasons set forth above, the ABA respectfully submits that the judgment of the court below should be affirmed in each of these cases.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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In the Supreme Court of the United States

BLAINE LAFLER,

Petitioner,

v.

ANTHONY COOPER,

Respondent.

STATE OF MISSOURI,

Petitioner,

v.

GALIN E. FRYE,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, SUPPORTING RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The Center on the Administration of Criminal Law (the "Center") is an organization dedicated to developing and promoting best practices in the administration of criminal justice through academic research, litigation, and participation in the formulation of public policy. The Center's litigation component aims to use its empirical research and experience with criminal justice practices to assist in important criminal justice cases in state and federal courts throughout the United States.

The Center is well-suited to provide historical and empirical context to aid this Court's understanding of the importance of the Sixth Amendment right to effective assistance of counsel during the plea process. This brief provides that context and also proposes prophylactic measures that would, if adopted, reduce the risk going forward that counsel's ineffective assistance will deprive a defendant of an opportunity to make informed decisions about his defense during plea negotiations.[1]

SUMMARY OF ARGUMENT

This Court has recognized that "[t]he disposition of criminal charges by agreement between the prosecutor and the accused ... is an essential component of the

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* represents that this brief was authored solely by *amicus curiae* and its counsel and that no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties were notified of *amicus curiae*'s intention to file this brief in accordance with Supreme Court Rule 37, and all parties consent to the filing of this brief.

administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971). The prevalence of plea bargaining has revolutionized criminal law in this country. Because most defendants forgo their right to trial and resolve criminal charges against them through a plea, the plea process determines the outcomes of the overwhelming majority of criminal cases in the United States.

The obvious disparities in power, information, and resources between defendants and prosecutors make effective assistance of counsel in plea negotiations crucial. The right to effective assistance of counsel is an essential check on the operation of the plea system and is critical to ensuring that defendants' plea decisions are voluntary and intelligent. Accordingly, this Court has recognized that effective assistance of competent counsel is the touchstone for the constitutional legitimacy of the plea process. *See, e.g.*, *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

In *Hill v. Lockhart*, this Court held that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." 474 U.S. 52, 58 (1985). "*[I]n the context of guilty pleas*," this Court explained, *Strickland*'s prejudice requirement "focuses on whether counsel's constitutionally ineffective performance *affected the outcome of the plea process*." *Id.* at 58-59 (emphasis added). Hill argued that his plea was involuntary because his attorney had misinformed him as to when he would be eligible for parole. On those facts, therefore, Hill had to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

Petitioners and the United States as *amicus curiae* miscast *Hill* as identifying the *only* circumstance in which the right to counsel at the plea bargain stage may be effectively enforced. The Court in *Hill* naturally described the showing of prejudice required in a way that made sense in that particular context: there, the defendant pleaded guilty based on allegedly incorrect information about the consequences of his plea. But the Court conspicuously did *not* attempt to announce in *Hill* a one-size-fits-all rule for every circumstance. Rather, the Court emphasized that *Strickland* prejudice may manifest itself in a variety of ways. *See id.* at 59-60.

When counsel's deficient performance deprives a defendant of a meaningful opportunity to consider a plea agreement, that defendant's right "to make [a] fundamental decision[] regarding his case," *Jones v. Barnes*, 463 U.S. 745, 751 (1983), has been irrevocably compromised. As the federal courts of appeals have uniformly concluded (along with most state appellate courts that have considered the question), such a defendant demonstrates prejudice if there is a "reasonable probability that" "counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. In other words, defendants like Cooper and Frye—who either were deprived entirely of the opportunity to consider a plea offer, or rejected an offer based on counsel's patently deficient advice—demonstrate prejudice if there is a reasonable probability that, but for counsel's unprofessional errors, they would have accepted a lawful plea agreement offered by the prosecution.

The prejudice suffered by such defendants cannot be "cured" by a subsequent fair trial. Once the deprivation of the right to make a fundamental decision about one's defense is complete, a showing of prejudice flowing from *that deprivation* is sufficient to satisfy *Strickland*. That concept of prejudice fits comfortably within this Court's precedents, which establish that the Sixth Amendment right to effective assistance of counsel is not merely in service of a defendant's Fifth Amendment right to a fair trial. Recognizing prejudice in such circumstances is essential to ensuring that the right to effective assistance of counsel at every critical phase of criminal proceedings is not an empty promise at the plea phase—which, as a practical matter, is usually the only phase of proceedings. Moreover, because States are free to devise, as a matter of state law, appropriate remedies for violations of their citizens' federal constitutional rights, this Court should defer to the remedy fashioned by the courts of the State of Missouri in No. 10-444.

When the State offers a plea, it is making a statement that the interests of justice and enforcement of law are adequately served by that offer. Almost by definition, a higher sentence is overly punitive in the circumstances by the State's own calculus. Of course, where a defendant makes a fully informed decision to reject a plea offer and go to trial, it is only reasonable and fair that acceptance of a later offer (if any), or disposition without a plea deal, result in a harsher sentence. But when a defendant's "rejection" is simply the result of a failure of defense counsel to communicate the offer, or the result of patently deficient advice concerning the offense with which the defendant is charged, the interests of justice are not

served by over-punishment. It therefore benefits both defendants and the prosecution to ensure that defendants make a fully informed decision about any plea bargain offered. Simple prophylactic procedures, including ensuring that all plea offers are made on the record in the presence of the defendant, would further that goal. A few States have already adopted such procedures, designed to safeguard defendants' rights to make critical decisions about their defense in light of all the relevant information available.

ARGUMENT

I. A MEANINGFUL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA NEGOTIATIONS IS DEMANDED BY THE SIXTH AMENDMENT AND IS A CRITICAL COMPONENT OF THE ADMINISTRATION OF CRIMINAL LAW

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. In the United States today, virtually all criminal defendants resolve criminal charges by pleading guilty. Absent the effective assistance of counsel, the disparities in information and power inherent in that process would undermine confidence in the outcome. As this Court has long recognized, defendants are entitled to effective assistance of counsel during the critical plea bargaining phase so that they can make voluntary and intelligent decisions during that process. *Hill*, 474 U.S. at 56; *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Contrary to petitioners' argument, the Sixth Amendment right to effective assistance of counsel

also protects a defendant's right to make informed decisions about his or her defense—including whether to plead guilty or proceed to trial. This Court should continue to safeguard that right by holding that a defendant may demonstrate prejudice by showing that, but for counsel's unprofessional errors, he would have accepted a pending offer for a lesser sentence than the one he ultimately received through a subsequent plea or after trial. Only by making the right to counsel at the plea stage meaningful can this Court ensure a tolerable degree of confidence in the plea process and its outcomes.

A. Confidence In The Plea Process And Its Outcomes Is Essential To The Administration Of Criminal Law

Nearly all criminal charges in the U.S. are resolved through plea agreements. According to the United States Sentencing Commission, "[i]n fiscal year 2009, more than 96 percent of all offenders [pleaded guilty], a rate that has been largely the same for ten years."[2] Statistics from state courts are virtually identical. In 2006, the most recent year for which data are available, some 95% of convictions obtained in state courts in the seventy-five most populous counties in the U.S. were obtained through guilty pleas.[3] "[P]lea bargaining ... is not some adjunct to the criminal justice system; it *is*

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[2] U.S. Sentencing Commission, *Overview of Federal Criminal Cases—Fiscal Year 2009*, at 3 (2010), *available at* http://www.ussc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf.

[3] *See* Thomas H. Cohen & Tracey Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006*, Bureau of Justice Statistics Bulletin (U.S. Dep't of Justice), rev. July 15, 2010, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf.

the criminal justice system." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1911-12 (1992). Confidence in the fairness of outcomes achieved through the plea process is therefore absolutely central to the administration of criminal law in this country.

The modern trend favoring guilty pleas was driven in large part by prosecutors' desire to lighten their caseloads. *See* George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America*, 44, 124 (2003).[4] Because most criminal cases are resolved without trial, a prosecutor's decision about what plea to offer and accept frequently amounts to a final adjudication of guilt and punishment. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan. L. Rev. 869, 878 (2009).

Lawmakers have taken account of this phenomenon, and "now legislate[] with precisely this framework of prosecutorial power over pleas in mind." *Id.* at 880. Indeed, "the Department of Justice and the various United States Attorneys' Offices often argue before Congress that legislation with inflated or mandatory punishments should be passed or retained because those laws give prosecutors the leverage they need to exact pleas and to obtain cooperation from defendants." *Id.*[5] As a result, state and federal

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[4] The practice has gained widespread support from judges for similar reasons. Plea bargaining not only creates more space on judges' calendars for growing civil dockets, Fisher, *supra*, at 123-24, it also guards against "the reputational blow of a reversal." *Id.* at 176.

[5] *See* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 728 & n.5 (2005) (providing examples).

prosecutors can typically choose from a menu of charges—and, therefore, from a menu of potential sentences, often including mandatory minimums. That prosecutorial leverage puts overwhelming pressure on defendants to plead and accept an offer of a lesser sentence. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 538 (2001).

Plea agreements may therefore result in sentences that reflect (more accurately than post-trial sentences) the intended punishment for the crime. Because "[p]leas and cooperation with the government are the preferred norm, not the exception," Barkow, *Institutional Design*, 61 Stan. L. Rev. at 880, "[c]riminal statutes now commonly permit (or purport to require) draconian punishments that no one expects to be imposed in the typical case"; "'[l]eniency' has therefore become not merely common but a systemic imperative." Sanford H. Kadish et al., *Criminal Law and Its Processes: Cases and Materials* 1006 (8th ed. 2007); *see also* Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 Stan. L. Rev. 1399, 1402 (2003) ("Given the extreme severity of sentencing in the United States by world standards ... it is hard to take seriously the notion that ninety percent of those serving our remarkably heavy sentences are the beneficiaries of 'bargains.'"); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 Crim. L.Q. 67, 87 (2005); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. Pa. L. Rev. 79, 129–30 (2005).

Because the punishment imposed through plea bargaining is, in a very real sense, the sentencing

norm, the public must have confidence that the results of that process reflect a fair and reliable outcome reached through a fundamentally fair process.

B. The Legitimacy Of Plea Bargaining Has Historically Depended On Effective Assistance Of Counsel To Counter The Inherently Coercive And Asymmetric Confrontation Between Prosecutor And Defendant

Effective assistance of counsel is central to the institutional legitimacy of plea deals, both because of the inherent risk of coercion during plea negotiations, and because of the stark information and other asymmetries between the parties.

Absent effective counsel, criminal defendants would be wildly disadvantaged vis-à-vis prosecutors at the bargaining table. In 2009, "[m]ore than half of the federal offenders sentenced ... had not completed high school and only 5.4 percent of offenders had completed college." U.S. Sentencing Commission, *Overview of Federal Criminal Cases – Fiscal Year 2009*, at 3 (2010), *available at* http://www.ussc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf. In light of this Court's recognition that "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law," *Powell v. Alabama*, 287 U.S. 45, 69 (1932), these statistics are a stark reminder that educated defendants are a relative rarity in our criminal justice system.

Beyond the obvious information and resource disparities between prosecutors and defendants, and in large part due to the systemic legislative "correction" for plea bargaining, *see supra*, 7-8, there are significant

disparities between sentences imposed through pleas and those imposed after a trial. Defendants who choose to go to trial thus risk suffering a severe "trial penalty." Candace McCoy, *Bargaining in the Shadow of the Hammer: The Trial Penalty in the USA*, *in The Jury Trial in Criminal Justice* 23, 25 (Douglas D. Koski ed., 2003); *see also* Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 Colum. L. Rev. 959, 992 (2005) (average penalty ranged from 13 to 461 percent depending on the state and the offense); Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. Mich. J.L. Reform 345, 347–48 (2005) (average sentence for federal defendants who go to trial is three times higher than the sentence for defendants who plead to similar charges). The trial penalty phenomenon only amplifies the risk of coercion inherent in all plea bargaining negotiations.[6]

The trial penalty burdens the innocent as well as the guilty. Even innocent defendants may choose to

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[6] The true trial penalty is likely substantially higher than these statistics suggest, given that most studies compare similar charges in assessing the trial penalty and do not account for the common practice of allowing a defendant to plead to a lesser offense than the one initially charged. *See* Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 Marq. L. Rev. 213, 227–28 (2007).

Prosecutors may also seek to impose additional penalties on those who exercise their right to go to trial, including property forfeiture, charges against friends and family, civil or regulatory sanctions, or immigration consequences. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 Cal. L. Rev. 1585, 1611 & n.97 (2005).

plead guilty rather than face trial and the attendant risk of a much harsher sentence. Indeed, some scholars have argued that such defendants are even more risk-averse than their guilty counterparts—and therefore more likely to accept a plea. Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 Yale L.J. 2011, 2012 (1992).[7] And because sentencing guidelines often prescribe harsher punishments for those claiming innocence (and thus not accepting responsibility), the pressure on innocent defendants to plead guilty is substantial. *See* Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 Am. Crim. L. Rev. 1363, 1394–98 (2000). The effects of this pressure are evident at least in the federal courts, where acquittal rates have steadily dropped as guilty pleas have risen. Wright, *Trial Distortion*, 154 U. Pa. L. Rev. at 102 (showing that acquittal rates fell from a peak of 5.5% of adjudicated case outcomes in 1971 to just 1% in 2002). Although guilty pleas have crowded out all trial outcomes, they have taken the heaviest toll on acquittals. *Id.* at 106.

Driven by the inherent disparities between defendants and prosecutors, as well as the grave risk of

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[7] *See also* Innocence Project, *250 Exonerated, Too Many Wrongfully Convicted* 32-33 (2010), *available at* http://www.innocenceproject.org/docs/InnocenceProject_250.pdf ("27% [of 250 inmates exonerated by DNA evidence] were convicted based at least in part on false confessions, admissions or guilty pleas."); *see also* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 74 (2008) (analyzing the cases of 200 convicts exonerated by DNA testing, 9 of whom had pleaded guilty to a rape or murder that they did not commit).

coercion at the bargaining table, this Court has long recognized a Sixth Amendment right to effective assistance of counsel during the plea process. The need for counsel's assistance to remedy information and other asymmetries between prosecutors and defendants is a consistent thread throughout this Court's Sixth Amendment decisions. *See, e.g.*, *Williams v. Kaiser*, 323 U.S. 471, 476 (1945) (because "[a] layman is usually no match for the skilled prosecutor," the right to effective counsel during plea negotiations is "'fundamental.'") (quoting *Powell*, 287 U.S. at 70); *id.* at 475-76 ("Only counsel [can] discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate."); *Van Moltke v. Gillies*, 332 U.S. 708, 721 (1948) ("Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered."); *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("[T]he adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances."); *Hill*, 474 U.S. at 56 ("Where ... a defendant is represented by counsel during a plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'") (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

Petitioners' and the United States' argument that the right to counsel attaches only at the entry of a guilty plea cannot be squared with these and other

precedents of this Court recognizing that the Sixth Amendment right to effective assistance of counsel attaches at the initiation of criminal proceedings against the accused, for any "'critical' stage[]" of those proceedings. *Maine v. Moulton*, 474 U.S. 159, 170 (1985) (citation omitted); *contra Frye* Petr. Br. 19; *Lafler* Petr. Br. 12 n.3; *Frye* U.S. Br. 23 n.6; *Lafler* U.S. Br. 18.

Moulton, for example, involved law enforcement's surreptitious recording of conversations between the defendant and a codefendant cooperator, after the defendant had been charged. 474 U.S. at 176-77. Holding that the defendant's Sixth Amendment right to counsel had been violated, the Court explained that the right attaches at the initiation of criminal proceedings, because "'[i]t is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Id.* at 170 (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)). In light of the arguments pressed here by petitioners and the United States, it is worth quoting the Court's opinion in *Moulton* at some length:

> The assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, 'critical' stages in the criminal justice

> process "where the results might well settle the accused's fate ...."

Id. (citation omitted).

Plea negotiations invariably take place after the initiation of criminal proceedings, and no phase of criminal proceedings requires a more direct confrontation between the defendant and prosecutor or is more likely to "settle the accused's fate." Thus, as this Court very recently reaffirmed, "the *negotiation of a plea bargain* is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (emphasis added).

C. A Defendant Who Is Deprived Of The Opportunity To Make An Informed Decision Regarding The Prosecution's Plea Offer Is Prejudiced If He Receives A Harsher Sentence Than He Would Have, But For Counsel's Unprofessional Errors

Under *Hill*, a defendant who accepts a plea based on counsel's deficient advice demonstrates *Strickland* prejudice if there is "a reasonable probability" that the "outcome of the plea process" would have been different but for counsel's errors. 474 U.S. at 59. In the instant cases, respondents Cooper and Frye were denied the opportunities to make informed decisions about whether to accept pending plea offers. As the federal courts of appeals uniformly have concluded, defendants like Cooper and Frye demonstrate prejudice under *Strickland* where there is a reasonable probability that the outcome of the plea process would have been different—*i.e.*, that they would have *accepted* the State's pending plea offer—but for counsel's unprofessional errors.

In *Strickland*, this Court adopted a two-part standard for evaluating claims of ineffective assistance of counsel. The defendant must show that (1) "counsel's representation fell below an objective standard of reasonableness," 466 U.S. at 687-88; and that (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

Applying that test in *Hill*, this Court held that "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." 474 U.S. at 58. "*[I]n the context of guilty pleas*," this Court explained, *Strickland*'s prejudice requirement "focuses on whether counsel's constitutionally ineffective performance *affected the outcome of the plea process*." *Id.* at 58-59 (emphasis added). Hill argued that his plea was involuntary because his attorney had misinformed him as to when he would be eligible for parole. On those facts, therefore, Hill had to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

Petitioners and the United States as *amicus curiae* misread *Hill* as identifying the *only* circumstance in which there can be prejudice from the ineffective assistance of counsel at the plea bargain stage. *Hill* is not so circumscribed. The Court in *Hill* naturally described the showing of prejudice required in a way that made sense in that particular context: there, the defendant pleaded guilty instead of proceeding with trial, and allegedly made that decision based on incorrect information about the consequences of his plea. But the Court did *not* suggest, much less hold,

that a defendant could not demonstrate *Strickland* prejudice, as a matter of law, unless he or she had entered a guilty plea relying on the deficient advice of counsel.

When counsel's deficient performance deprives a defendant of a meaningful opportunity to consider a plea offer, that defendant's right "to make [a] fundamental decision[] regarding his case," *Jones v. Barnes*, 463 U.S. 745, 751 (1983), has been irrevocably compromised. *See also Nunes v. Mueller*, 350 F.3d 1045, 1053 (9th Cir. 2003) (quoting *Jones* and holding that such a defendant has been deprived of "the right to participate in the decision as to, and to decide, his own fate—a right also clearly found in Supreme Court law"); *In re Alvernaz*, 830 P.2d 747, 755 (Cal. 1992) (citing *Jones* for the proposition that "a defendant possesses a constitutionally protected right to participate in the making of certain decisions which are fundamental to his or her defense").

A defendant's right to make fully informed decisions about his or her case is distinct from the right to a fair trial, but is no less important, particularly in view of the high proportion of criminal cases resolved through plea bargaining. As this Court recently reminded in the choice-of-counsel context, "[i]t is true enough that the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *United States v. Gonzales-Lopez*, 548 U.S. 140, 145 (2006); *see also Williams v. Jones*, 571 F.3d 1086, 1092 (10th Cir. 2009) ("*Gonzalez-Lopez* recognizes that counsel can be ineffective where 'his mistakes have harmed the defense.' Surely, the plea process is part of the

defense.") (quoting *Gonzalez-Lopez*, 548 U.S. at 147), *cert. denied*, 130 S. Ct. 3385 (2010).

As the federal courts of appeals have uniformly concluded, such a defendant demonstrates prejudice under *Strickland* and *Hill* if there is a "reasonable probability that" "counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. In other words, defendants like Cooper and Frye—who either were deprived entirely of the opportunity to consider a plea offer, or rejected an offer based on counsel's patently deficient advice—demonstrate prejudice if there is a reasonable probability that, but for counsel's unprofessional errors, they would have accepted the plea.

The prejudice suffered by such defendants cannot be "cured" by subsequent constitutionally adequate procedures. Once the deprivation of the right to make a fundamental decision about one's defense is complete, a showing of prejudice flowing from that deprivation is sufficient to satisfy *Strickland*. That concept of prejudice fits comfortably within this Court's precedents, and it is essential to ensuring that the right to effective assistance of counsel at every critical phase of criminal proceedings is not an empty promise at the plea phase—which, as a practical matter, is often the most critical and indeed the only phase of proceedings.

Petitioners and their *amici* create a straw man by framing the issue as whether the defendants have a constitutional right to a plea bargain, or a right to receive the lowest possible sentence. Defendants, of course, do not have a freestanding right to receive a particular plea offer or any plea offer at all. But defendants also do not have a constitutional right to an appeal, *Jones*, 463 U.S. at 751, yet defendants are

entitled to effective assistance of counsel when there is an opportunity to appeal, *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000).

"Incompetent advice [during plea bargaining] distorts the defendant's decisionmaking process," *Padilla*, 130 S. Ct. at 1493 (Alito, J., concurring), thereby depriving him or her of the right "to make certain fundamental decisions regarding [his] case," including "whether to plead guilty," *Jones*, 463 U.S. at 751; *see also Frye* U.S. Br. at 17 ("[A] defendant must establish that counsel's deficient performance deprived him of a 'substantive or procedural right to which the law entitles him.'") (citation omitted). For these reasons, petitioners' and the Solicitor General's reliance on *Lockhart v. Fretwell*, 506 U.S. 364 (1993), and *Nix v. Whiteside*, 475 U.S. 157 (1986), is entirely misplaced. *See, e.g., Frye* U.S. Br. 15-17.

In *Whiteside*, the defendant petitioned for habeas corpus relief from his state murder conviction on the ground that his counsel was ineffective for refusing to cooperate in presenting perjured testimony. 475 U.S. at 162-63. Because the attorney conformed to "accepted norms of professional conduct" in refusing to assist perjury against his client's wishes, this Court "discern[ed] no failure to adhere to reasonable professional standards that would in any sense make out a deprivation of the Sixth Amendment right to counsel." *Id.* at 171. In other words, the defendant's claim failed step one of *Strickland*, so the later discussion of whether Whiteside was "prejudiced" by his failure to perjure himself is superfluous dicta. *See id.* (counsel's "representation of Whiteside f[ell] well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable

under *Strickland*"). In the instant cases, by contrast, there is no genuine dispute that counsel's errors fell outside "accepted standards of professional conduct." (As the Solicitor General points out, the questions presented are premised on the fact that they did. *Frye* U.S. Br. 13 n.2.)

Moreover, nothing in this Court's discussion of prejudice in *Whiteside* suggests, much less "confirm[s]," *Frye* U.S. Br. 15, that there is no "cognizable prejudice" when counsel's unprofessional errors undermine the fairness of the plea process. Indeed, it is startling that the United States would compare Whiteside's desire to present perjured testimony with these defendants' insistence on the right to make informed decisions fundamental to their liberty.

Fretwell is equally inapposite. There, the defendant argued that he had been prejudiced by his counsel's failure to make an objection at the capital sentencing phase of his trial based on a then-valid Eighth Circuit decision, *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985), holding that a death sentence is unconstitutional if based on an aggravating factor that duplicates an element of the underlying felony. *Fretwell*, 506 U.S. at 384. Although the Eighth Circuit had since overruled *Collins*, thereby recognizing that *Collins* was legally erroneous, that court held on habeas review that Fretwell had shown prejudice under *Strickland*, because the trial court would have sustained the *Collins* objection, had it been made at Fretwell's trial. This Court reversed, explaining that a defendant seeking to demonstrate *Strickland* prejudice must show that counsel's errors rendered the proceedings "unfair or unreliable." *Id.* at 369. The Court explained

that Fretwell's sentencing was neither unfair nor unreliable, because "ineffectiveness of counsel [did] not deprive [Fretwell] of any substantive or procedural right to which the law entitles him." *Id.* at 372.

As in *Whiteside*, Fretwell was not entitled "'to the luck of a lawless decisionmaker.'" *Id.* at 370 (quoting *Whiteside*, 475 U.S. at 175, in turn quoting *Strickland*). That is, a defendant cannot "demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry." *Id.* at 373 (O'Connor, J., concurring); *id.* at 373-74 (listing the "likely effect of perjured testimony," "the impact of a meritless Fourth Amendment objection," and "the effect of an objection [that is] wholly meritless under current governing law" as the only factors the Court has held to be impermissible considerations in the prejudice inquiry).

A defendant who receives ineffective assistance of counsel during plea negotiations because counsel withheld information, or provided materially false information relevant to the fundamental decision to plead or go to trial, has been deprived of his right to exercise authority over fundamental decisions in his defense. That is a substantive right to which the law entitles him, *see Barnes*, 463 U.S. at 751, the deprivation of which renders the outcome fundamentally "unfair" under *Fretwell*. *See Padilla*, 130 S. Ct. at 1493 (Alito, J., concurring) ("[I]ncompetent advice [during plea bargaining] distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question."); *cf. Gonzales-Lopez*, 548 U.S. at 145 (defendant's Sixth Amendment rights cannot be simply "disregarded so long as the trial is, on the whole, fair").

Adopting variants of this reasoning, *every* federal court of appeals—and all but two state appellate courts to have addressed the question—recognize that a defendant who rejects a favorable plea offer and proceeds to trial is entitled to relief under the Sixth Amendment if he can prove that there is a reasonable probability that he would have accepted the plea offer but for counsel's unprofessional errors. *See United States v. Rodriguez*, 929 F.2d 747, 753 n.1 (1st Cir. 1991) ("[T]he fact that a defendant, after rejecting a guilty plea, still receives all the constitutional protections of trial does not preclude an attack on sixth amendment grounds if counsel's performance during plea bargaining" was ineffective.); *United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998) (defendant suffered prejudice, even though the government had not made a formal plea offer, because "he did not have accurate information upon which to make his decision to pursue further plea negotiations or go to trial," due to counsel's errors); *United States v. Day*, 969 F.2d 39, 42 (3d Cir. 1992) (defendant stated claim for ineffective assistance of counsel where he alleged that he would have accepted a plea bargain but for trial counsel's failure to explain that defendant might be classified as a "career offender"); *Arnold v. Thaler*, 630 F.3d 367, 372 (5th Cir. 2011) ("[T]o establish that he was prejudiced by his counsel's deficient performance, [defendant] need only demonstrate a reasonable probability that he would have accepted the ... plea offer before it was withdrawn, had his counsel told him about the offer."); *Griffin v. United States*, 330 F.3d 733, 737 (6th Cir. 2003) ("The second element of the *Strickland* test in the plea offer context is that there is a reasonable probability the petitioner would have pleaded guilty given competent advice."); *Julian v.*

Bartley, 495 F.3d 487, 498 (7th Cir. 2007) ("In the context of plea agreements, the prejudice prong focuses on whether the deficient information was the decisive factor in a defendant's decision to plead guilty or to proceed to trial."); *Kingsberry v. United States*, 202 F.3d 1030, 1032 (8th Cir. 2000) (holding that "prejudice is possible, notwithstanding a subsequent fair trial, where counsel failed to provide accurate advice regarding a plea agreement offer"); *Nunes*, 350 F.3d at 1053 (prejudice resulted where defendant was deprived of "the right to counsel's assistance in making an informed decision once a plea had been put on the table"); *Williams v. Jones*, 571 F.3d at 1090 n.3 ("[A] defendant is required to show that counsel's performance fell below an objective level of reasonableness and that, but for counsel's deficient performance, the defendant would have accepted the plea offer and pled guilty."); *Coulter v. Herring*, 60 F.3d 1499, 1504 (11th Cir. 1995) ("In other words, in this instance, Coulter 'must show that there is a reasonable probability that, but for counsel's errors, he would ... have pleaded guilty and would [not] have insisted on going to trial.'") (quoting *Hill*, 474 U.S. at 59); *In re Alvernaz*, 830 P.2d at 754; *People v. Curry*, 687 N.E.2d 877, 882 (Ill. 1997); *Commonwealth v. Mahar*, 809 N.E.2d 989, 993-94 (Mass. 2004); *In re Plante*, 762 A.2d 873, 876 (Vt. 2000); *Cottle v. State*, 733 So.2d 963, 966-67 (Fla. 1999); *Williams v. State*, 605 A.2d 103, 108 (Md. 1992); *Lloyd v. State*, 373 S.E.2d 1, 3 (Ga. 1988); *Larson v. State*, 766 P.2d 261, 263 (Nev. 1988); *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986); *Tucker v. Holland*, 327 S.E.2d 388, 394-96 (W. Va. 1985); *State v. Simmons*, 309 S.E.2d 493, 497-98 (N.C. Ct. App. 1983); *State v. Donald*, 10 P.3d 1193, 1200 (Ariz. Ct. App. 2000); *Ex parte Lemke*, 13 S.W.3d 791,

796-97 (Tex. Crim. App. 2000), *In re McCready*, 996 P.2d 658, 659-60 (Wash. Ct. App. 2000); *State v. Lentowski*, 569 N.W.2d 758, 761 (Wis. Ct. App. 1997); *Lyles v. State*, 382 N.E.2d 991, 994 (Ind. Ct. App. 1978).

Any other rule would render the Sixth Amendment right to counsel at the plea bargaining stage an empty promise, as a right without the possibility of relief from its deprivation is no right at all.

II. PROSECUTORS SHOULD BE ENCOURAGED TO OFFER ANY PLEA BARGAIN ON THE RECORD IN THE PRESENCE OF THE DEFENDANT

As this Court has long recognized, "the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law. Federal law simply 'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.'" *Danforth v. Minnesota*, 552 U.S. 264, 288 (2008) (quoting *American Trucking Assn's, Inc. v. Smith*, 496 U.S. 167, 178-79 (1990)); *see also Teague v. Lane*, 489 U.S. 288, 298-99 (1989); *Danforth*, 552 U.S. at 289 ("While we have ample authority to control the administration of justice in the federal courts[,] ... we have no comparable supervisory authority over the work of state judges."). Accordingly, if this Court agrees that respondents have a Sixth Amendment right to effective assistance during plea negotiations, it should defer to the Missouri courts as to the proper remedy in No. 10-444, *Missouri v. Frye*.

Petitioners' asserted fears that recognizing prejudice (and a remedy for it) in these circumstances will open the "floodgates" are unfounded. It bears emphasis that *every* federal court of appeals—and all

but two States to have considered the question—currently recognize prejudice under *Hill* and enforce Sixth Amendment rights in these circumstances, so a decision in respondents' favor would essentially maintain the status quo.

And, as this Court observed in *Padilla*, "[s]urmounting *Strickland*'s high bar is never an easy task." 130 S. Ct. at 1485. Similar "floodgates" claims were raised and rejected in *Hill*, and "[a] flood did not follow in that decision's wake." *Id.* at 1484-85; *see also* Gray Proctor & Nancy King, *Post*-Padilla: Padilla's *Puzzles for Review in State and Federal Courts*, 23 Federal Sentencing Reporter 239, 244 (2011) ("Although Padilla will probably result in an increase in prisoner filings, successful collateral challenges will be more of a trickle than the roaring stream of upset convictions evoked by the 'floodgates' imagery.").[8]

In the federal courts, pleas of guilty and *nolo contendere* rose sharply between 1991 and 2001, Wright, *Trial Distortion*, 154 U. Pa. L. Rev. at 91, concurrent with many of the federal court decisions recognizing that claims of ineffective assistance at the plea stage demand a remedy, *see, e.g.*, *Rodriguez*, 929 F.2d at 753 n.1; *Gordon*, 156 F.3d at 380; *Day*, 969 F.2d at 42; *Coulter*, 60 F.3d at 1504. There is no evidence that the widespread, nearly uniform development in Sixth Amendment jurisprudence has dampened

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[8] Similarly, in *Henderson v. Morgan*, this Court called Petitioner's fears that a decision in favor of the defendant would invite countless collateral attacks on judgments "exaggerated." 426 U.S. 637, 646-47 (1976). "Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused." *Id.* at 647.

prosecutors' enthusiasm for plea bargaining to even the slightest degree.

Petitioner Frye also argues that a ruling in respondents' favor would encourage defense attorneys intentionally to withhold offers, on the theory that such a strategy would be a win-win for their clients. *Frye* Petr. Br. 28. But the states are quite capable of crafting rules to prevent that sort of gamesmanship.

Arizona is a case in point. Like all the federal appellate courts and the majority of states that have addressed the issue, the Arizona Court of Appeals has held that "a defendant may state a claim for post-conviction relief on the basis that counsel's ineffective assistance led the defendant to make a uninformed decision to reject a plea bargain and proceed to trial." *Donald*, 10 P.3d at 1200. In response to that decision, the Arizona trial courts now routinely conduct a so-called *Donald* hearing when a defendant rejects a plea offer and decides to proceed to trial. *Donald* hearings are meant "to ensure, *prior to trial*, that [the defendant] adequately understood the state's plea offer and the consequences of conviction." *State v. Ware*, No. 2 CA-CR 2011-0010-PR, 2011 WL 1630274, at *2 (Ariz. Ct. App. Apr. 26, 2011); *id.* (denying defendant's ineffective assistance claim because he rejected plea offers following *Donald* hearings and therefore could not show prejudice); *see also Rivera-Longoria v. Slayton*, 242 P.3d 171, 172 (Ariz. Ct. App. 2010) (noting that the defendant had rejected a plea offer at a *Donald* hearing before asking for the offer to be reinstated).

States could of course devise other, even simpler, procedures towards the same goal. In New Jersey, for example, "[p]rior to the arraignment/status conference

the prosecutor and the defense attorney shall discuss the case, including any plea offer ... and report thereon at the arraignment/status conference." N.J. Ct. R. 3:9-1(b). The rules further provide that "[e]ach status conference shall be held in open court with the defendant present." N.J. Ct. R. 3:9-1(c). In addition, "[a]ny plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant's attorney." N.J. Ct. R. 3:9-1(b). New Jersey's rules "reflect the importance of informed plea bargaining, requiring that a defendant be advised at the pretrial conference of the sentencing exposure for the offenses charged." *State v. Dennis*, 2011 WL 31360, at *3 (N.J. Super. App. Div. Jan. 6, 2011) (citing Sylvia B. Pressler & Peter G. Verniero, *Current N.J. Court Rules*, cmt. 1.4.2. on R. 3:9-2 (2011)).

Other states may soon follow suit. For example, in *In re Alvernaz*, *see supra*, 16, the Supreme Court of California encouraged the memorialization of plea offers in order to discourage future claims that "with effective representation, [the defendant] would have accepted the proffered plea bargain." 830 P.2d at 756. Specifically, the court encouraged "parties to memorialize in some fashion prior to trial" (1) the fact that a plea bargain offer was made, (2) that the defendant was advised of the offer, its precise terms, and the range of punishments that could result from either accepting the plea bargain or proceeding to trial, and (3) the defendant's response to the offer. *Id.* at 756 n.7. That court observed that if parties take these steps, "subsequent claims of ineffective assistance of counsel in[volving] the defendant's decision to reject the offer are likely to fail unless the record establishes

that the information provided the defendant, as memorialized, was incomplete or inaccurate." *Id.*[9]

Requiring that defendants make crucial decisions about their own defense on the record, or that they be advised of critical information on the record, is not a new or radical innovation but a logical extension of current practice. For example, since 1969 this Court has required that the record must reflect that a guilty plea was entered knowingly and voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969) ("What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence."). The Federal Rules of Criminal Procedure and many state jurisdictions also require judges to develop the basis of a guilty plea on the record. Fed. R. Crim. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."); *see, e.g.*, *Watt v. State*, 420 S.E.2d 769, 770 (Ga. Ct. App. 1992) ("[T]he record as a whole must show that the defendant understood the rights he was waiving and that the plea was entered voluntarily ... ."); *People v. Lopez*, 525 N.E.2d 5, 7 (N.Y. 1988) (requiring defendant to

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[9] A Florida state judge has similarly advocated for all plea offers to appear on the record. Hon. Anthony K. Black (Judge, 13th Judicial Circuit) & Susan S. Matthey (senior staff attorney of the 13th Judicial Circuit), *Advice to the Criminal Bar: Preparing Effectively for Allegations of Ineffectiveness*, 82 Fla. B.J. 49, 50 (May 2008) ("[I]f the record reflects when plea offers are conveyed and rejected, such will allow for a summary denial of allegations of ineffective assistance of counsel for failure to convey a plea offer.").

describe the circumstances of the commission of the crime and holding that where "factual recitation negates an essential element of the crime pleaded to, the court may not accept the plea without making further inquiry to ensure that defendant understands the nature of the charge and that the plea is intelligently entered"); *see also Santobello*, 404 U.S. at 261 ("[Federal Rule of Criminal Procedure] 11, governing pleas in federal courts, now makes clear that the sentencing judge must develop, on *the record*, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge.").

A ruling in respondents' favor should incentivize prosecutors to take proactive steps toward ensuring that defendants are fully informed of any plea offer by, at a minimum, advising defendants of the terms of any plea offer on the record in open court. Providing incentives for compliance with such procedures (and for proactive steps by the prosecution to ensure communication of an offer even in the absence of state-mandated procedures) ultimately inures to the benefit of both defendants and prosecutors, as the prosecution should have a keen interest in resolving criminal charges, if possible, on terms that the State believes fairly serve the interests of justice.

When the State offers a plea, the offer reflects the State's judgment that the interests of justice and law enforcement are adequately served by that offer. Almost by definition, then, a higher sentence is overly punitive in the circumstances, by the State's own calculus. Of course, where a defendant makes a fully informed decision to reject a plea offer and go to trial, it is only reasonable and fair that acceptance of a later

offer (if any), or disposition without a plea deal, result in a harsher sentence. There must be some incentive to avoid imposing costs on the State to prepare for and try the case. But when a defendant's "rejection" is simply the result of a failure of defense counsel to communicate the offer, or the result of patently deficient advice concerning the offense with which the defendant is charged, the interests of justice are not served by over-punishment.

CONCLUSION

This Court should hold that a defendant who demonstrates a reasonable probability that he would have accepted a pending plea offer for a lesser sentence, but for counsel's unprofessional errors, suffers prejudice for Sixth Amendment purposes. This Court should defer to the courts of the State of Missouri as to the appropriate remedy for defendant Frye's constitutional injury.

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STATE OF MISSOURI,
Petitioner,

v.

GALIN E. FRYE,
Respondent.

ON WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS,
WESTERN DISTRICT

BRIEF OF AMICI CURIAE CONNECTICUT AND 28 OTHER STATES IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I. Contrary to the holding in Hill v. Lockhart, 474 U.S. 52 (1985) – which held that a defendant must allege that, but for counsel's error, the defendant would have gone to trial – can a defendant who validly pleads guilty successfully assert a claim of ineffective assistance of counsel by alleging instead that, but for counsel's error in failing to communicate a plea offer, he would have pleaded guilty with more favorable terms?

II. What, remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

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INTEREST OF THE *AMICI*

The *amici* states have a compelling interest in the finality of convictions emanating from their courts, and defending these presumptively valid judgments against post-conviction claims of ineffective assistance. They also have an interest in the finality of convictions resulting from pleas of guilty. They therefore have a strong interest in the proper application of the law governing claims that guilty plea convictions should be overturned due to ineffective assistance of counsel. Thus, the *amici* states have a substantial interest in this Court's determination of whether the states must provide relief to, and a remedy for, a criminal defendant who has validly pleaded guilty, though ignorant of a "more favorable" plea bargain about which his attorney never informed him.[1]

SUMMARY OF THE ARGUMENT

In this case, the Missouri Court of Appeals for the Western District ("The Missouri Court") ruled that a criminal defendant, convicted after entering a guilty plea, is entitled to relief when he later discovers that his attorney failed to convey to him an earlier, more favorable, plea offer made at the State's discretion.[2]

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[1] Rule 37(4) permits the Attorneys General to file amicus curiae briefs without permission of the parties. In Connecticut, the Chief State's Attorney serves as the equivalent of the Attorney General for criminal matters. Conn. Const. Amd. XXIII; Conn. Gen. Stat. § 51-278(c).

[2] Throughout this brief, "plea offer" refers to an offer by the State to recommend to the trial court pre-trial disposition under certain

The Missouri Court remanded the case to the trial court with direction that the defendant should be given the opportunity to insist upon going to trial, or to plead guilty, should the State convey to him another plea offer.[3]

This case implicates two areas of jurisprudence. First, it involves the question of whether – and under what circumstances – the defendant's guilty plea can be withdrawn after conviction. A body of law focusing precisely on this question balances the State's interest in finality of convictions and conservation of resources with a defendant's interest in making a well-informed decision to plead guilty and forfeit rights. The scenario presented, therefore, involves the subsidiary question of whether a decision to plead guilty is sufficiently informed if a defendant is unaware of an earlier plea offer involving "more favorable" terms.

Second, this case involves the question of whether a criminal defendant's attorney renders constitutionally ineffective assistance of counsel when he fails to convey a plea offer to the defendant, and the defendant therefore forfeits the opportunity to accept the State's discretionary offer and ask the trial court to enter his

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terms, which, having not been accepted by and embodied in the judgment of the court, in no way constitutes a fully executed, binding plea agreement pursuant to Santobello v. New York, 404 U.S. 257 (1971).

[3]In effect, the Missouri Court's order has the potential to accomplish nothing. It does not require the State to extend the terms of the earlier plea offer, a requirement that would have separation of powers consequences.

plea accordingly. This Court's ineffective assistance cases similarly seek to balance the State's interests with the defendant's.

Notwithstanding that both areas of the law involve a similar balancing of interests, they do not necessarily encompass the same objectives. In ineffective assistance cases, the objective is to ensure that a conviction rests upon the machinery of an adversarial process that produced just results. With respect to pleas of guilty, the objective is to ensure that a defendant's conviction, resting upon his admission and his waiver of rights (including his right to trial), is valid as a voluntary act. This Court recognized the distinction between these objectives in United States v. Ruiz, 536 U.S. 622 (2002). There, the Court rejected a claim from a defendant, who pleaded guilty, that she was entitled to receive the terms of an *earlier* plea offer which she rejected because it required her to waive her right to receive exculpatory materials pursuant to Brady v. Maryland, 373 U.S. 83 (1963). The Court reasoned that "the need for [the exculpatory information] is more closely related to the *fairness* of a trial than to the *voluntariness* of the plea." Ruiz, *supra*, at 633 (emphasis in original). The defendant's plea was, therefore, deemed voluntary and she was bound by its terms.

Standing at the intersection of these somewhat incongruous objectives is this Court's decision in Hill v. Lockhart, 474 U.S. 52 (1985). There, the Court addressed a claim that a defendant pleaded guilty based upon his attorney's erroneous advice regarding his eligibility for parole. Hill, like Ruiz, recognized that

claims of ineffective assistance of counsel generally relate more to the fairness of trial than to the guilty plea that resulted in conviction. Generally, therefore, a defendant is bound by the terms of his plea except to the extent that counsel error caused the defendant to forfeit rights he otherwise would have exercised.

Thus, the Court modified the test for ineffectiveness set forth in Strickland v. Washington, 466 U.S. 668 (1984), and applied it to a situation where a defendant sought to disavow his guilty plea on account of attorney error. The Court, reiterating the need, acknowledged in Strickland, to balance the State's and the defendant's competing interests, held that under such circumstances, a defendant's plea can be found involuntary, but only if he could show that his attorney's advice surrounding the plea constituted deficient performance and that, otherwise, the defendant would not have waived his trial rights.

Notwithstanding that this respondent's conviction rests upon his guilty plea, the Missouri Court did not apply the test for attorney ineffectiveness as modified by Hill. Perhaps recognizing that the Hill standard simply would not give to the defendant a chance at the terms of the lost plea offer, the court instead purported to apply the unmodified test for ineffectiveness announced in Strickland, which addressed claims of ineffective assistance *at trial*. That test requires a defendant to show that, as a result of attorney error, the adversarial process by which he was convicted produced an unreliable judgment. The result is awkward, because the defendant was not convicted

through adversarial testing of the State's evidence against him. He was convicted by his guilty plea.

Taking this approach, the Missouri Court presumed that the "process" of conviction is deemed unreliable by an attorney's failure to convey a plea offer. It also treated this case as though the complaint before it related solely to the fairness of trial, and entirely purged its analysis of any consideration that it may have related, as well or instead, to the voluntariness of the plea. As a further consequence, therefore, the Missouri Court failed properly to balance the State's and the defendant's interests consistent with this Court's precedents in both areas of the law.

Some courts in similar situations invoke Hill, but assume that it set forth a symmetrical mandate. In other words, they read Hill to warrant relief where attorney error causes the loss of the opportunity to accept a plea offer. They reason that the foregone plea situation merely presents the converse of that addressed in Hill. This "what-goes-up-must-also-come-down" approach ignores that the Hill test specifically contemplates the balancing of interests and objectives when a defendant seeks to *revoke* the plea into which he entered rather than to recapture one he forfeited.

It makes little difference whether, as here, the Hill test is abandoned altogether in a guilty plea case, or whether it is read to permit the recapture of a plea deal lost due to attorney error. In either situation, the approach impermissibly burdens the State in contravention of this Court's precedents. It requires the State to correct an attorney's ethical failing, without

regard to whether the attorney's mistake either caused a defendant to forego the protections of the adversarial process altogether, or caused a breakdown in the adversarial process because it impeded the State's obligation to provide a fair and reliable process for adjudication. Because the attorney's failure to inform a defendant of a plea offer does neither of these things, relief is not warranted.

ARGUMENT

I. INTRODUCTION

In claims of ineffective assistance of counsel regarding pretrial events, the Court "scrutinize[s] any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial." United States v. Wade, 388 U.S. 218, 227 (1967). Plea negotiations do not necessarily constitute a single confrontation. "The State to some degree encourages pleas of guilty at every important step in the criminal process." Brady v. United States, 397 U.S. 742, 750 (1970). Where, as in the matter now before the Court, there have been multiple opportunities for a defendant to resolve his case before going to trial, each event must be scrutinized to determine whether a deprivation of counsel's assistance occurred at that event.

Hence, this case arises not because there is a complaint regarding a single pre-trial event – "plea negotiations." Rather, the complaint here focuses on two separate pre-trial events. First, the defendant's attorney failed to convey a plea offer. This event could

not logically have impacted the fairness of a later trial. Wade, therefore, suggests that the counsel guarantee is not implicated. Second, the defendant later pleaded guilty. A guilty plea is valid without regard to considerations of trial "fairness." Instead, a guilty plea is valid as long as it was entered voluntarily and intelligently. Thus, it is clear that errors that might otherwise impact upon one's right to test the Government's evidence at trial (i.e., "the adversarial process") do not govern the determination of whether a guilty plea is valid.

> [A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. . . . A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established.

Menna v. New York, 423 U.S. 61, 63 n.2 (1975).

Here, the respondent does not claim that he is factually *not guilty*, or even that it would have been better for him to test the State's evidence at trial. The claimed "constitutional violation" – that his attorney rendered ineffective assistance by failing to communicate an antecedent plea offer – is not "logically inconsistent" with the establishment of his guilt. Indeed, the respondent merely wants to restructure his

guilt through the earlier plea offer – a more favorable one for him, to be sure. This Court's precedents suggest that he may not do so.

II. CONVICTION BY VALID PLEA OF GUILTY FULLY SATISFIES THE DEMANDS OF THE ADVERSARIAL PROCESS

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.

Strickland v. Washington, 466 U.S. at 685. Accordingly, in Strickland, this Court set forth the elements of the test for determining whether attorney error affected the adversarial process such that it produced something less than a "just result." Absent some *effect of attorney error on the judgment*, the Court explained, setting aside the judgment is not warranted. Id. at 691-92.

When a defendant pleads guilty, however, it is not the mechanisms of the "adversarial process" that produce the judgment. It is true that the strength of the case of his adversary – the prosecutor – and the fear of a greater sentence after trial may have influenced the defendant to plead guilty. In other words, some pleas of guilty may arise because the defendant has contemplated and is persuaded by what the adversarial process holds for his fate; but it is not the adversarial process itself that results in conviction. This Court has also recognized that people may, at times, plead guilty simply because they are conscience-bound to do so,

regardless of whether the adversarial process, if employed, is even likely to result in conviction. Brady v. United States, 397 U.S. at 750. "All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas." Id.

Thus, the judgment in a guilty plea case does not emanate directly from the workings of the adversarial process, although its elements may bear on a defendant's motivation to plead guilty. Instead, the judgment stems from the defendant's confession, in open court, that he has committed the crime for which he has been charged. United States v. Broce, 488 U.S. 563, 569-70 (1989). A plea of guilty and the attendant conviction "comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilty and a lawful sentence." Id. at 569. In other words, when a defendant has pleaded guilty, his admission has supplanted the adversarial process in its quest to produce a "just result." See Boykin v. Alabama, 395 U.S. 238, 242-43 n.4 (1969) (guilty plea is a "stipulation that no proof by the prosecution need be advanced"). The plea itself is the "just result" that is the end of the adversarial process, except to the extent that the plea – *not the adversarial machinery* – is invalid.

III. A DEFENDANT'S IGNORANCE OF THE EXISTENCE OF ANOTHER PLEA OFFER DOES NOT RENDER HIS LATER GUILTY PLEA AND CONVICTION INVALID

Resolution of criminal cases by plea, obviating as it does the State's burden to prove each and every

element of charged crimes, was not always looked upon with favor. The Court has referred to it as a "previously clandestine practice," the open acknowledgment of which was an evolution. Bordenkircher v. Hayes, 434 U.S. 357, 362 (1978). The chief concern, of course, is that, in pleading guilty and halting the adversarial process, the defendant waives critical rights that the adversarial process promises to him. Most notably, the conviction is entered without a trial. Therefore, not the least of the rights waived by the defendant in pleading guilty are the rights to be tried by a jury, and to confront the witnesses against him, as well as his right not to be a witness against himself. Brady, supra, 397 U.S. at 748.

Still, the Court has recognized plea disposition, though perhaps less than ideal, to be a legitimate means of adjudication because it is *mutually beneficial* to the defendant, the State, and the Judiciary. Corbitt v. New Jersey, 439 U.S. 212, 222 & n. 12 (1978); Blackledge v. Allison, 431 U.S. 63, 71 (1977). The defendant avoids extended pretrial incarceration and the anxieties and uncertainties attendant to trial, and he gains swifter disposition of his case and the chance to acknowledge his guilt. Further, he begins rehabilitative measures sooner. Judges and prosecutors conserve scarce and important resources, and the public is protected from the risks posed by criminals who may be guilty but nonetheless at liberty pending completion of criminal proceedings. Blackledge, supra, at 71.

The Court's approach in guilty plea cases thus exhibits a careful balancing to give weight to both the State's interest in the finality of convictions emanating

from guilty pleas and the defendant's right to test the State's evidence through the adversarial process. As the Court has noted, the chief virtues that flow from plea disposition – speed, economy and finality – can be secured "only if dispositions by guilty plea are accorded a great measure of finality." Id. In short, the value of plea bargaining is "eroded if a guilty plea is too easily set aside." Premo v. Moore, 131 S.Ct. 733, 741 (2011). A defendant may not, therefore, attack the validity of his guilty plea "merely because [he] made what turned out, in retrospect, to be a poor deal." Bradshaw v. Stumpf, 545 U.S. 175, 186 (2005).

Accordingly, because a plea of guilty and resulting conviction "comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilty and a lawful sentence," when a defendant seeks to reopen the proceeding and disavow his plea and underlying waiver of rights, the inquiry is ordinarily limited to whether his actions were voluntary and counseled. Broce, supra, 488 U.S. at 569.

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats, misrepresentations, [or other improprieties such as bribes].

Brady, 397 U.S. at 755 (quote and cite omitted). Thus, if both voluntary and counseled, the plea of guilty and concomitant waiver of rights is not amenable to collateral attack on the resulting conviction. Broce, 488

U.S. at 569. Moreover, to the extent it is claimed that a plea of guilty is involuntary and inadequately counseled because of a deprivation of constitutional rights, the claim is only viable if the plea of guilty was dependent upon the deprivation – i.e., the deprivation *caused* the defendant to enter his plea.

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Tollett v. Henderson, 411 U.S. 258, 267 (1973). These limitations balance the State's interests in maintaining convictions by guilty plea with a defendant's interests in making an informed and voluntary decision to relinquish his rights, regardless of his motivations for doing so.

These principles are not altered merely because the claim is that a plea was involuntary and inadequately counseled due to attorney error. A guilty plea may be rendered invalid as a result of ineffective assistance of counsel. Bradshaw v. Stumpf, 545 U.S. at 186. But, nonetheless, it must be shown that the plea of guilty and waiver of rights were dependent upon the attorney's error, and that the error caused the plea to be

involuntary and unintelligent. Hill v. Lockhart, 474 U.S. 52 (1985).

Where, as in the case at bar, the defendant enters a plea of guilty unaware that there existed the earlier *potential* for more favorable disposition, it is illogical to conclude that his ignorance of the earlier plea offer *caused* him to accept the latter. An affirmative weight, such as inducement by threat or misrepresentation, has not been placed upon the defendant through his ignorance of the earlier offer, constraining his ability to make a free choice. In other words, the defendant's ignorance of the earlier offer is not an encumbrance on the requisite voluntariness and awareness regarding the nature and effect of the plea deal into which he did enter.

The voluntariness of a plea can be determined only by considering all of the relevant circumstances surrounding it. Brady, supra, 397 U.S. at 749. But, these "circumstances" relate to the decision to enter into the guilty plea, not matters extraneous to the decision. Events that have no logical connection to the decision to plead guilty cannot render the guilty plea invalid; rather, there must be a nexus between the claimed constitutional violation and the decision. Parker v. North Carolina, 397 U.S. 790, 796 (1970) (citation omitted) (connection between alleged error and plea of guilty one month later had "become so attenuated as to dissipate the taint.").[4]

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[4] It is not altogether different in the situation where a claimed constitutional violation precedes a fair trial. In Frisbie v. Collins, 342 U.S. 519 (1952), a defendant had been forcibly abducted from

More than 100 years ago, this Court reasoned that a conviction by plea is valid if a defendant is "fully advised of the truth, force, and effect of his plea of guilty." Hallinger v. Davis, 146 U.S. 314, 324 (1892). More recently, the Court affirmed that a defendant's plea of guilty is valid if he is informed of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments to which he is exposed upon the entry of a guilty plea. Iowa v. Tovar, 541 U.S. 77, 80 (2004). The substance of the plea offer itself is not a valid consideration in determining whether a plea was entered voluntarily. Bordenkircher, supra, 434 U.S. at 362. Indeed, a plea is not coerced even if a defendant feels pressured into admitting guilt in order to obtain a more lenient sentence. McKune v. Lile, 536 U.S. 24, 42 (2002); see also, Brady, supra, at 754 (plea not compelled even though law promised a lesser sentence if defendant forfeited trial right).

Thus, for example, in Brady, the Court rejected the claim that a defendant's fear of the death penalty in the event of conviction after a jury trial coerced him into pleading guilty. That was so even though, in the interim, the death penalty provision of the statute under which the defendant had been convicted was found to be unconstitutional. In Ruiz, the Court rejected the claim that the dispositive plea was in some way tainted by the fact that the earlier plea had been rejected because the defendant sought disclosure of impeachment information. Similarly, the Government's

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one state and brought to another for trial. The Court upheld his conviction because the trial itself was fair.

breach of a plea agreement did not *retroactively* cause the defendant's plea to be involuntary in Puckett v. United States, 129 S.Ct. 1423, 1430 (2009).

In Tollett, the defendant's guilty plea foreclosed independent inquiry into a claim of discrimination in the selection of the grand jury, Tollett, 411 U.S. at 266, even though this Court has clearly stated that such discrimination is so inherently evil as to undermine the entire adversarial process without regard to whether it had an actual effect on the judgment. Rose v. Mitchell, 443 U.S. 545 (1979). That is because, when a defendant seeks to withdraw a guilty plea, the focus is not on the integrity of the conviction (i.e., "the adversarial process"), but whether he should be given an opportunity to withdraw his plea, valid when entered, and be given another chance to test the State's evidence (i.e., because his plea was involuntary). McMann v. Richardson, 397 U.S. 759 (1970). In each of these cases, it was claimed that some error of constitutional magnitude – indeed, error that may very well have been found unconstitutional on direct review, but nonetheless abstract from the decision to plead guilty – caused the plea to be involuntary. The Court, however, did not retreat from the longstanding recognition that a guilty plea must stand if a defendant is aware of its "truth, force, and effect." This case demands the same result; the respondent's plea of guilty must stand, notwithstanding his attorney's error in failing to convey the earlier, attenuated, plea offer.

To be sure, this respondent *may not* have entered into the dispositive plea if he was aware of the earlier plea offer, if he had accepted it, and if the trial court

imposed its terms. Thus, his ignorance of the earlier offer may have been a "but for" cause of his decision to later plead guilty. Id. Nonetheless, it does not follow that he was coerced into later pleading guilty. In Brady, the Court noted:

> [E]ven if we assume that Brady would not have pleaded guilty except for the death penalty provision of [the statute under which he was convicted], this assumption merely identifies the penalty provision as a "but for" cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act.

Brady, supra, 397 U.S. at 750.

Similarly, in Hutto v. Ross, 429 U.S. 28 (1976), a defendant entered a plea agreement and, although not required by that agreement, waived his right against self-incrimination and confessed to the crime. He later withdrew from the agreement and demanded a jury trial, claiming that the confession should be suppressed because, "but for" the earlier plea agreement, he would not have confessed. This Court reasoned that "causation in that sense has never been the test of voluntariness." Id. at 30. Because the confession was not "extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence," the confession was deemed valid. Id. Similarly, here, the fact that the respondent was ignorant of the earlier plea offer is not akin to the type of "coercion" contemplated

in Hutto; it simply did not *compel* the later, dispositive, plea.

Nor does the fact that the respondent was ignorant of the earlier plea offer mean that he was "uncounseled" with respect to the "truth, force, and effect" of the dispositive plea.

> The law ordinarily considers a waiver knowing, intelligent, and sufficiently informed if the defendant fully understands the nature of the rights and how it would likely apply *in general* in the circumstances – even though the defendant may not know the *specific detailed* consequences of invoking it.

Tovar, supra, 541 U.S. at 92 (quote and citation omitted, emphasis in original). Thus, in Brady, the Court held that the defendant's plea was intelligently made because he was aware of the nature of the charge against him, and there was no indication that he was not in control of his mental faculties. Brady, supra, 397 U.S. at 756. Moreover, a plea of guilty is no less "counseled" merely because a defendant is unaware of all relevant circumstances.

> [T]his Court has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various

> constitutional rights, despite various forms of misapprehension under which a defendant might labor.

Ruiz, supra, 536 U.S. at 630-31 (and listing examples).

The same is true with claims that an attorney's deficient performance precluded full awareness of the circumstances. In Broce, for example, it was claimed the defendant's pleas of guilty violated Double Jeopardy, a defense about which counsel did not render advice. This Court rejected the claim, noting that waiver of the right to trial "derives not from any inquiry into a defendant's subjective understanding of the range of potential defenses, but from the admissions necessarily made upon entry of a voluntary plea of guilty." Broce, supra, 488 U.S. at 573-74. In fact, the requirement that a guilty plea be "counseled" is "not a requirement that all advice by the defendant's lawyer withstand retrospective examination in a post-conviction hearing." McMann, supra, 397 U.S. at 770.

Thus, an attorney's mistaken belief that an allegedly coerced confession is nonetheless admissible at trial may cause him to fail to object to its admission. This may change the course of a trial and have a prejudicial impact on its outcome (i.e., it may affect the "adversarial process"). However, an attorney's mistaken belief that a confession is inadmissible at trial cannot serve as a predicate to the claim that a plea was unintelligent. Parker v. North Carolina, supra, 397 U.S. at 797-98. In McMann, the Court confronted a trilogy of cases where it was claimed that pleas of guilty were motivated by prior coerced confessions – the effects

of which coercion trial counsel failed to ameliorate through adequate advice. Consistent with the Brady view that guilty pleas must stand if a defendant is aware of the general *consequences*, the Court rejected the Second Circuit's determination that a plea is involuntary if it is the consequence of an involuntary confession. McCann, supra at 765. According to the Court, the circumstances of the coerced confessions did not have "abiding impact" or "taint the plea," notwithstanding counsel's errors:

> [The defendant's] later petition for collateral relief asserting that a coerced confession induced his plea is at most a claim that the admissibility of his confession was mistakenly assessed and that since he was erroneously advised, . . his plea was an unintelligent and voidable act. *The Constitution, however, does not render pleas of guilty so vulnerable.*

McMann 397 U.S. at 769 (emphasis added). The defendant who pleads guilty, the Court went on to say, "assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts." Id. at 774. Moreover, even when a defendant lacks a "full appreciation of all the *consequences* flowing from his waiver," it does not mean that he lacked the necessary information to "satisf[y] the constitutional minimum." Tovar, 541 U.S. at 92.

There is no indication that this respondent had anything less than a full appreciation of the

consequences of entering his dispositive plea. This respondent's complaint is that "but for" his attorney's failure to inform him of the earlier plea offer, he would not have entered the later one. As in McMann, the impact upon this respondent's guilty plea of his attorney's "error" – the failure to inform him of the earlier plea offer – on his later decision to plead guilty was inconsequential. The lapse did not have "abiding impact" on his later decision, nor did it "taint the plea" such that the respondent could not have understood the nature of the charges against him and the consequences of pleading guilty.

At bottom, whether the guilty plea and accompanying waivers that resulted in this respondent's conviction are invalid because he was unaware of the earlier plea offer is governed by this Court's decision in Moran v. Burbine, 475 U.S. 412 (1986). Moran arose in the Fifth Amendment context, but the Court later recognized its applicability to Sixth Amendment controversies. Patterson v. Illinois, 487 U.S. 285, 296-97 (1988). In Moran, a defendant was arrested, executed a series of waivers, and, after interrogation by police, confessed to a crime, all while entirely unaware that the police had rebuffed his attorney's efforts to contact him. The defendant later claimed that the failure of the police to inform him of his attorney's attempts to reach him deprived him of information essential to his ability to knowingly waive his Fifth Amendment rights. This Court held that the defendant's waiver of rights was nevertheless valid. The Court reasoned that:

> Events occurring outside the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right.

Moran, 475 U.S. at 422. As the Court explained, "the same defendant, armed with the same information" upon which his waiver decision was based, would be said to have made a valid waiver had a lawyer not attempted to contact him at all. Id.

> Nothing in any of our waiver decisions or in our understanding of the essential components of a valid waiver requires so incongruous a result. No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him *calibrate his self interest* in deciding whether to [waive his rights].

Id. (emphasis added).

Similarly, like the theoretical defendant mentioned by the Moran Court, this respondent would not be heard to complain that his dispositive plea was invalid if the earlier plea offer had never been extended by the State. Further, while many may argue that an attorney, unlike the police, *is* required to help a defendant "calibrate his self interest," that is not the

constitutional role of an attorney. The *constitutional* entitlement to an attorney's assistance is to play the role necessary to ensure that the adversarial system produces just results. Strickland, 466 U.S. at 685; see also, Id., at 689 (goal of Sixth Amendment right to effective assistance not to "improve the quality of legal representation"); Morris v. Slappy, 461 U.S. 1, 13, (1983) (constitution does not guarantee "meaningful relationship" with defense counsel). As the Moran Court continued:

> Granting that the "deliberate or reckless" withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand *the nature of his rights and the consequences of abandoning them*.

Moran, supra, 475 U.S. at 423-24 (emphasis added).

Like the waivers in Moran, this respondent's waiver of rights attendant to his guilty plea were not rendered invalid because of something entirely unknown to him – the State's discretionary extension of the earlier plea offer. Thus, his attorney's failure to communicate the earlier plea offer, while "objectionable as a matter of ethics," does not implicate the Constitution.

IV. THE FAILURE OF COUNSEL TO INFORM A DEFENDANT OF A STATE'S DISCRETIONARY PLEA OFFER, THOUGH "PROFESSIONALLY OBJECTIONABLE," DOES NOT CONSTITUTE A "BREAKDOWN IN THE ADVERSARIAL PROCESS"

When a defendant enters a plea of guilty unaware, because of his attorney's error (or, perhaps, negligence), of an earlier plea offer encompassing more favorable terms, there is no impact upon the adversarial process. See Ruiz, supra, 536 U.S. at 634 (*Thomas, J.*, concurring) (concerns regarding fairness of trial are "not implicated at the plea stage"). Accordingly, the Constitution is not implicated.

There is little dispute that an attorney's failure to convey a plea offer is ethically objectionable. See, e.g., Lawyer Disciplinary Board v. Turgeon, 210 W.Va. 181 (2000); In re Longacre, 155 Wash.2d 723 (2005). Some jurisdictions recognize a tort sounding in malpractice for failure to convey a plea offer. E.g., Krahn v. Kinney, 43 Ohio St.3d 103 (1989); Falkner v. Foshaug, 108 Wash. App. 113 (2001). At times, the cause of action is recognized without regard to whether a conviction has been overturned because counsel was found *constitutionally* ineffective. Krahn, supra. Other courts, recognizing that such a cause of action might result in a "flood of nuisance litigation" from "criminals who may be guilty, [but] . . . could have gotten a better deal," require a showing of actual innocence. Foshaug, supra, at 123-24 (internal quote omitted).

The question raised by this and similar cases, though, is whether the failure to convey the offer (or to mistakenly appraise an offer) rises to a *constitutional* violation. A "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." Nix v. Whiteside, 475 U.S. 157, 165 (1986). Instead, "In evaluating Sixth Amendment claims, the appropriate inquiry *focuses on the adversarial process*, not on the accused's relationship with his lawyer as such." Wheat v. United States, 486 U.S. 153, 159 (1988) (emphasis added, internal quote omitted). Thus, while the adversarial process is not implicated at the plea bargaining stage (except, of course, insofar as the *entry* of a guilty plea truncates the process and must, therefore, be a voluntary and informed act), the Sixth Amendment right to the effective assistance of counsel focuses *entirely* on the adversarial process.

Strickland makes it more than clear that in order for there to be a violation of the right to the effective assistance of counsel, there must be a *breakdown in the adversarial process.*

> In every case the court should be concerned with whether . . . the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland, 466 U.S. at 696; see also, Id. at 685 (fair trial "is one in which evidence subject to adversarial testing is presented to an impartial tribunal for

resolution . . . ." and the Sixth Amendment envisions "counsel's playing a role that is critical to the ability of the adversarial system to produce just results"); at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."); at 687 (unless defendant shows both deficient performance and prejudice, "it cannot be said that the conviction . . . resulted from a breakdown in the adversarial process that renders the result unreliable.").

In some cases, a breakdown in the adversarial process is presumed. Strickland, 466 U.S. at 692. In these cases, the likelihood of prejudice is so great that an examination into the actual effect to a particular case is not worth the cost. Id. Moreover, the State is justifiably accountable for the impairments involved because they are easy to identify and the prosecution is directly responsible for them. Id. In claims of ineffective assistance, however, actual prejudice must be proved. Id. at 693. Whether presumed or actual, there *must* be a breakdown in the adversarial process before it can be said that there has been ineffective assistance of counsel.

This focus on the adversarial process is critical in the analysis of whether there has been a violation of the right to the effective assistance of counsel, because "[i]neffective assistance claims that lack necessary foundation may bring instability to the very [adversarial] process the inquiry seeks to protect." Premo v. Moore, 131 S.Ct. 733, 741-42 (2011).

Strickland allows a defendant to escape rules of waiver and forfeiture, and a disrespect for the latitude it requires could have grave consequences to the utility that plea bargaining brings to the criminal justice system. Id. Thus, in analyzing whether a plea of guilty, with its attendant waivers, could be revoked as invalid due to attorney error, this Court recognized that the critical focus is on the error's effect, if any, on the adversarial process and the judgement that results. Hill v. Lockhart. 474 U.S. 52, 57 (1985).

Consistent with its guilty plea jurisprudence, the Court in Hill balanced the interests of the State with those of the defendant. The Hill Court expressly noted the limitations imposed upon plea revocation – i.e., that a plea is only rendered invalid if it is involuntary and uncounseled. Id. at 56. The Court explicitly held Strickland applicable in guilty plea cases for the very same policy reasons: "The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of conviction or sentence." Hill, 474 U.S. at 57, quoting Strickland, 466 U.S. at 693. In addition, the Hill Court recognized that imposing Strickland's prejudice requirement, albeit in modified form, when a defendant seeks to revoke his guilty plea serves the State's interest in finality of convictions. Hill, supra, at 58.

The Court very recently reiterated these concerns. "Prosecutors must have assurance that a plea will not be undone years later because of infidelity to . . . the teachings of Strickland." Premo, 131 S.Ct. at 742. As it did in Ruiz, the Court again distinguished between the objectives in ineffective assistance cases (a fair trial

through the adversarial process) and guilty plea cases (voluntariness). The Court further noted that the question in guilty plea cases is not whether a defendant entered a plea because he was sure he would be convicted, but whether he established beyond reasonable probability that he would *not have entered* his plea but for counsel's error. Premo, supra, at 744. Thus, there can be no doubt that this Court's extension of Strickland to guilty plea cases in Hill was engineered to give consideration to the same concerns attendant to claims that a guilty plea was involuntarily *entered*. See also, Roe v. Flores-Ortega, 528 U.S. 470, 485 (2000) (emphasis in original) ("the decision whether to plead guilty (i.e., *waive trial*), rested with the defendant and, [therefore], counsel's advice in Hill might have caused the defendant to forfeit a judicial proceeding to which he was otherwise entitled."). In other words, like Strickland, Hill is concerned with whether there is a breakdown in the adversarial process because a defendant unwittingly and involuntarily forfeited the protections to which that very process entitles him.

Nonetheless, courts routinely reason that the Hill test is symmetrical. Hill requires a defendant to show that but for counsel's advice, he *would not have* accepted plea disposition and waived important constitutional rights. Courts reason that Hill must also mean that ineffective assistance exists if a defendant can show that but for counsel error, he *would have* pursued the *potential* for plea disposition. E.g., Williams v. Jones, 583 F.3d 1254, 1255 (10th Cir. 2009) ("This case merely presents the converse of Hill"); Coulter v. Herring, 60 F.3d 1499, 1504 n. 7 (11th Cir. 1995) ("we believe that Hill also applies when a

defendant decided to accept a plea offer"); Commonwealth v. Mahar, 442 Mass. 11, 14 (2004) (citing Hill, and stating that the right to counsel "plainly includes counsel's effective assistance in connection with the defendant's decision to accept or reject a plea bargain offer"). These courts overlook that Strickland's focus is on the adversarial process. In other words, these decisions do not respect "the teachings of Strickland" and, thus, have brought instability to the adversarial process. See Premo, 131 S.Ct. at 741-42. Cases involving forfeited opportunities to plead guilty and avoid trial *are indeed* converse to Hill. But, they are *completely* converse. As opposed to Hill, they do not implicate the adversarial process at all.

Here, unlike these other courts, the Missouri Court did not employ Hill in a symmetrical fashion. Instead, the Court defaulted to what it perceived to be Strickland's "looser emphasis on whether a defendant can establish 'an adverse effect on the defense.'" Similarly, in its recent decision holding that ineffective assistance of counsel can be shown in the foregone plea context, the Tenth Circuit reasoned that "[s]urely, the plea process is part of the defense." Williams v. Jones, 571 F.3d 1086, 1092 (10th Cir. 2009). Whatever the approach, these decisions ignore that the goal of the Sixth Amendment right to effective assistance of counsel, pursuant to both Strickland *and* Hill, is to protect the adversarial process, and they exhibit a fundamental misconception of what is meant by "the defense" in Sixth Amendment jurisprudence.

The Sixth Amendment guarantees to a criminal defendant the assistance of counsel "for his defence."

This guarantee is meant to ensure fairness in the adversarial process. United States v. Morrison, 449 U.S. 361, 364 (1981). "Defence" does not mean "defense in relation to other objectives that may be important to the accused." Rothgery v. Gillespie County, 554 U.S. 191, 216 (2008) (*Alito, J., Scalia, J.,* and *Roberts, CJ.* concurring); see also, Faretta v. California, 422 U.S. 806, 818 (1975) (emphasis added) ("the [Sixth] Amendment constitutionalizes the right in an adversary criminal trial to *make a defense as we know it.*"). The "adversarial process" is one in which the prosecution's case is subjected to "the crucible of meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 656 (1984). It's goal is to achieve a reliable judgment *on the merits* of a criminal case, by permitting the parties to "contest all issues before a court of law" in pursuit of the "two-fold aim" of the criminal justice system that "guilt shall not escape or innocence suffer." United States v. Nixon, 418 U.S. 683, 709 (1974), (quoting Berger v. United States, 295 U.S. 78, 88 (1935)); see United States v. Ash, 413 U.S. 300, 307-15 (1973); Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."). Ultimately, the adversarial system is relied upon to "advance the public interest in truth and fairness," Polk County v. Dodson, 454 U.S. 312, 318 (1981), and guard the truth-seeking function of a trial. Perry v. Leeke, 488 U.S. 272, 282 (1989).

Within this adversarial system, the defense is guaranteed the "opportunity to participate fully and

fairly in the adversary factfinding process." Herring v. New York, 422 U.S. at 858. In addition, the adversarial process also preserves the defendant's right to test the State's evidence through cross-examination. Nix v. Williams, 467 U.S. 431, 446 (1984). Thus, in order to grant to a defendant these opportunities to fully participate in the factfinding process and test the evidence against him, the adversarial system guarantees to him the assistance of counsel "at pretrial confrontations *where the subsequent trial cannot cure* an otherwise one-sided confrontation between prosecuting authorities and the uncounseled defendant." Id. at 447.

None of these hallmarks of the adversary process are at risk when a defense attorney fails to convey to his client an offer to dispose of his case through plea disposition. The event is entirely non-confrontational and non-adversarial. There is no potential for a State-created impediment unless one accepts as realistic the notion that a prosecutor would offer a discretionary plea and then impede its conveyance to the defendant. Even in that odd scenario, the prosecutor would not be impeding the delivery of anything to which the defendant is entitled. In fact, once the prosecutor has extended the offer to defense counsel, he need have no further involvement. Moreover, communications between the attorney and the defendant are privileged, and the State can neither be responsible for nor prevent an attorney's failure to convey the offer. Further, the offer itself is unrelated to any meaningful testing of the State's case against the defendant. It is not part of the "contest" related to the merits of the case and the factfinding, truth-seeking function of the adversarial

process. Indeed, plea negotiations are wholly unconcerned with those functions. Menna v. New York, 423 U.S. 61, 63 n.2. It is precisely for this reason that pleas of guilty are valid regardless of the strength of the State's evidence against a defendant or whether a conviction could even be had at trial, so long as they are voluntary and intelligent. Brady, 397 U.S. at 750.[5]

Nothing about the plea negotiation process implicates the adversarial process through which criminal cases are adjudicated, until a defendant enters a guilty plea and waives the protections that the process affords him. For this reason, this Court has stated that a plea bargain, by itself, is "without constitutional significance" until it is "embodied in the judgment of a court." Mabry v. Johnson, 467 U.S. 504, 507-08 (1984), unrelated dictum disavowed, Puckett, supra, at 1430 n. 1. The failure of an attorney to convey a plea offer has absolutely no effect on the judgment, and, therefore, has no constitutional significance. Accordingly, the error, though "professionally unreasonable," does not warrant setting aside the judgment. Strickland, 466 U.S. at 691.

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[5] An exception, of course, is the situation where the Constitution forbids the charges from being filed in the first place, such as where the very statute under which a defendant is charged is wholly unconstitutional. See Menna, 423 U.S. at 62.

V. SETTING ASIDE A JUDGMENT FOR ERROR THAT DOES NOT IMPACT THE ADVERSARIAL SYSTEM AND, THEREFORE, HAS NO EFFECT ON THE JUDGMENT, IS DETRIMENTAL TO THE CRIMINAL JUSTICE SYSTEM AND THE PUBLIC

In explaining why the Court could not view as categorically non-cognizable on federal habeas review Sixth Amendment claims of ineffective assistance regarding the failure of an attorney to move to suppress evidence procured in violation of the Fourth Amendment, even though the Fourth Amendment claim is itself not cognizable, the Court stated that:

> The Constitution constrains our ability to allocate as we see fit the costs of ineffective assistance. The Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel.

Kimmelman v. Morrison, 477 U.S. 365, 379 (1986). Some have read Kimmelman to mean that Strickland warrants a remedy in the situation where an attorney fails to convey, or incorrectly conveys, a plea offer, even absent an effect on the judgment. Williams v. Jones, 571 F.3d 1086, 1091-92 (10th Cir. 2009); see also, Ebron, 120 Conn. App. 560, 588 (1010); Riggs v. Fairman, 399 F.3d 1179, 1189 (9th Cir. 2005) (*Bea J.*, dissenting) (citing Kimmelman). In fact, Kimmelman never reached the Strickland question. Kimmelman, supra, 477 U.S. at 391 (concurring opinion) ("the Court . . .

employs unnecessarily broad language that may suggest that we have considered and resolved the broader Strickland issue in this case. . . .[We] write separately because that suggestion is mistaken. . . .").

To be sure, Kimmelman did not reverse Strickland's recognition that the State is not responsible for and cannot prevent all attorney error. In fact, the State is responsible only for attorney error that impedes the State's obligation to foster an adversarial process that leads to a just result – a reliable judgment.

> The constitutional mandate is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law. Unless a defendant charged with a serious offense has counsel able *to invoke the procedural and substantive safeguards* that distinguish our system of justice, a serious risk of injustice infects the trial itself. *When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty.*

Evitts v. Lucey, 469 U.S. 387, 396 (1985) (emphasis added) (quote and cite omitted).

Because an attorney's failure to inform his client of a plea offer is an error that does not affect the judgment, any "remedy" for the error requires the state to go beyond its constitutional mandate. It does nothing

to legitimize the adversarial process – the *factfinding* process by which the prosecution's evidence is tested to ensure a reliable determination of guilt. Indeed, whether the crime fits the facts and whether the punishment fits the crime become irrelevant inquiries. For that reason the Court has recognized that:

> Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.

Delaware v. Van Arsdell, 475 U.S. 673, 681 (1986)(citing and quoting R. Traynor, The Riddle of Harmless Error 50 (1970)).

Accordingly, the Court has judiciously reversed convictions in the absence of error upon the judgment. The Court does so only when the State is directly responsible, and the law and public policy warrant reversal. For example, in Rose v. Mitchell, 443 U.S. 545 (1979), the Court set aside a conviction and quashed the indictment because of racial discrimination in the selection of grand jurors, even though the constitution of the petit jury and the determination of guilt were without flaw. In doing so, the Court reasoned that racial discrimination itself is unconstitutional, and was the "primary evil" underlying the Civil War and the later enactment of the Fourteenth Amendment. In addition, for a variety of public policy reasons, the harm, the Court reasoned, is to society as a whole.

Similarly, the "exclusionary rule" requires illegally seized evidence to be excluded at trial – even

though it may be reliable and even though exclusion may be fatal to the prosecution. In those cases, it is said that "the criminal is to go free [not because the conviction is unreliable, but] because the constable blundered." Mapp v. Ohio, 367 U.S. 643, 659 (1961) (citation omitted). Nonetheless, like the Constitution's proscription against racial discrimination that was operative in Rose, "[t]he criminal goes free, if he must, but it is the law that sets him free." Id. That law is the very Fourth Amendment right to be free from unreasonable searches and seizures that is granted to *all* citizens, including criminal defendants. Schneckloth v. Bustamonte, 412 U.S. 218, 267 (1973). In these contexts, where the government itself breaks the law, "it breeds contempt for the law." Mapp, supra.

However, where an attorney fails to convey to a criminal defendant a plea offer extended at the State's discretion, there is no consequence to society as a whole. Moreover, the State has not broken any underlying law. Unlike the prophylactic "exclusionary rule," there is no government conduct to deter – indeed, no government actor accountable to the people through the political process is involved.

Accordingly, to hold the people responsible, notwithstanding that they have delivered the constitutional mandate of providing a mechanism through which the adversarial process can reach a "just result," threatens to "breed contempt for the law" in this context. The criminal is able to avoid the penalty that a sound adversarial process has determined to be most effective because it is commensurate with his conduct. See Bordenkircher v. Hayes, 434 U.S. 357, 364-65

(1978) (re-indictment on more serious charges after breakdown in plea negotiations is not a due process violation where later conviction and sentence are commensurate with criminal conduct). It is this situation that "bestirs the public to ridicule" the judicial process.

Neither the law nor public policy support reversal of convictions for this attorney's particular error for which the State is not responsible and which has no effect on the judgment.

VI. CONCLUSION

The decision of the Missouri Court should be reversed.

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AMICUS CURIAE BRIEF

Nos. 10-444 & 10-209

IN THE

Supreme Court of the United States

JUL 22 2011

MISSOURI,

Petitioner,

v.

GALIN E. FRYE,

Respondent.

On Writ of Certiorari to the Court of Appeals of Missouri, Western District

BLAINE LAFLER,

Petitioner,

v.

ANTHONY COOPER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTEREST OF THE *AMICUS CURIAE*

The Constitution Project[1] is an independent, not-for-profit think tank that promotes and defends constitutional safeguards and seeks consensus solutions to difficult legal and constitutional issues. It respectfully submits this brief as *amicus curiae* in support of Respondent Galin Frye (Docket Number 10-444) and Respondent Anthony Cooper (Docket Number 10-209).

The Constitution Project achieves its goal through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. It has earned wide-ranging respect for its expertise and reports, which are designed to make constitutional issues a part of ordinary political debate. The Constitution Project frequently appears as *amicus curiae* before the United States Supreme Court, the federal courts of appeals, and the highest state courts in support of the protection of constitutional rights.

The Constitution Project's National Right to Counsel Committee is a bipartisan committee of independent experts representing all segments of America's justice system.[2] Established in 2004, the National Right to

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[1] No counsel for a party or a party to this proceeding authored this brief in whole or in part, and no counsel for a party or party to this proceeding made a monetary contribution intended to fund either the preparation or the submission of this brief. No person other than *amicus curiae*, its members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of the Parties' consent for *amicus curiae* to submit a brief in this proceeding are filed with this brief.

[2] The Committee members are as follows (affiliations listed for identification purposes only): **Hon. Rhoda Billings** (Co-Chair), Professor Emeritus, Wake Forest Law School; Justice,

North Carolina Supreme Court, 1985-1986, Chief Justice, 1986; Judge, State District Court, 1968-1972; **Robert M. A. Johnson** (Co-Chair), District Attorney, Anoka County, Minnesota; former President, National District Attorneys Association; **Hon. Timothy K. Lewis** (Co-Chair), Appellate Practice Group, Schnader Harrison Segal & Lewis LLP; Judge, United States Court of Appeals for the Third Circuit, 1992-1999; Judge, United States District Court for the Western District of Pennsylvania, 1991-1992; former Assistant United States Attorney, Western District of Pennsylvania; former Assistant District Attorney, Allegheny County, Pennsylvania; **Hon. Walter Mondale** (Honorary Co-Chair), Senior Counsel, Dorsey & Whitney LLP; Vice President of the United States, 1977-1981; United States Senator (D-MN), 1964-1977; former Minnesota Attorney General, who organized the *amicus* brief of 22 states in support of Gideon in *Gideon v. Wainwright*; **Hon. William S. Sessions** (Honorary Co-Chair), Partner, Holland and Knight LLP; Director, Federal Bureau of Investigation, 1987-1993; Judge, United States District Court for the Western District of Texas, 1974-1987, Chief Judge, 1980-1987; United States Attorney, Western District of Texas, 1971-1974; **Shawn Marie Armbrust**, Executive Director, Mid-Atlantic Innocence Project; former Northwestern journalism student who helped exonerate death row inmate Anthony Porter; **Hon. Jay W. Burnett**, Former Judge, 351st Criminal District Court, Harris County, Texas, appointed 1984; Judge, 183rd Criminal District Court, Harris County, Texas, 1986-1998; Visiting Criminal District Judge, 2nd Judicial Administrative Region of Texas, 1999-2000; **Alan Crotzer**, Senior Clerk, Department of Juvenile Justice; 2006 DNA exonoree; **Dr. Tony Fabelo**, Director of Research, Justice Center of the Council of State Governments; former Senior Associate, The JFA Institute; former Executive Director, Texas Criminal Justice Policy Council; **Hon. Norman S. Fletcher**, Of Counsel, Brinson, Askew, Berry, Seigler, Richardson & Davis; Justice, Supreme Court of Georgia, 1989-2005, Chief Justice, 2001-2005; **Monroe Freedman**, Professor of Law and Former Dean, Hofstra University School of Law; **Susan Herman**, Associate Professor of Criminal Justice, Pace University; former Executive Director, National Center for Victims of Crime; **Bruce Jacob**, Dean Emeritus and Professor of Law, Stetson University College of Law; former Assistant Attorney General for the State of Florida,

Counsel Committee's mission was to examine, across the country, whether criminal defendants and juveniles charged with delinquency who are unable to retain their own lawyers receive adequate legal representation, consistent with the United States Constitution, decisions of this Court, and rules of the legal profession.

The National Right to Counsel Committee spent several years examining the ability of state courts to provide adequate counsel to indigent individuals charged in criminal and juvenile delinquency cases who are unable to afford lawyers. In 2009, the Committee issued its report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, which included the Committee's findings on the vindication of the right to counsel nationwide, and based on those findings, made twenty-two

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represented Florida in *Gideon v. Wainwright*; **Abe Krash**, Retired Partner, Arnold & Porter LLP; former Visiting Lecturer, Yale Law School; Adjunct Professor, the Georgetown University Law Center; represented Clarence Gideon in *Gideon v. Wainwright*; **Charles J. Ogletree, Jr.**, Founding and Executive Director, Jesse Climenko Professor of Law, Charles Hamilton Houston Institute for Race and Justice, Harvard Law School; **Bryan Stevenson**, Director, Equal Justice Initiative of Alabama; Professor of Law, New York University School of Law; **Larry D. Thompson**, General Counsel, PepsiCo, Inc.; Deputy Attorney General of the United States, 2001-2003; former United States Attorney, Northern District of Georgia; **Hubert Williams**, President, Police Foundation; former New Jersey Police Director; former Special Advisor to the Los Angeles Police Commission; **Norman Lefstein** (Reporter and Member), Professor of Law and Dean Emeritus, Indiana University School of Law, Indianapolis; **Robert Spangenberg** (Reporter), President, The Spangenberg Group.

substantive recommendations for reform.[3] The Committee recommended that states provide sufficient funding and oversight to comply with constitutional requirements and endorsed litigation seeking prospective relief on behalf of a class of indigent defendants when states fail to comply with those requirements. *See id.* at 183-200, 210-213. The Committee also made recommendations for the federal government, criminal justice agencies, bar associations, judges, prosecutors, and defense lawyers to address the indigent defense crisis facing the nation. *See id.* at 200-209. *Justice Denied* has been cited in a wide variety of national news outlets, state newspapers, and state court opinions, and publicly praised by a wide array of public figures. *See e.g.*, Editorial, *The Sorry State of Indigent Defense*, WASH. POST, Dec. 9, 2010; Steven Zeidman, *Indigent Defense: Caseload Standards*, NEW YORK LAW JOURNAL, Mar. 24, 2010 *available at* http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202446663975; Attorney General Eric Holder, Address at the American Council of Chief Defenders Conference (June 24, 2009), *available at* http://www.justice.gov/ag/speeches/2009/agspeech-090624.html.

Accordingly, The Constitution Project has an interest as *amicus curiae* in these two important cases regarding the Sixth Amendment right to counsel currently pending before the Court.

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[3] *Justice Denied* is available on The Constitution Project's website, *www.constitutionproject.org*.

SUMMARY OF ARGUMENT

Because the overwhelming majority of criminal cases are settled through plea bargaining, effective assistance of counsel during that process is critical to the overall administration of justice. This is particularly true for indigent defendants who, because of the chronic underfunding of indigent defense systems, are more likely than others to accept a plea bargain.

The Sixth Amendment right to counsel ensures that plea negotiations, which largely operate outside the rules of criminal procedure and the rules of evidence, result in fair and reliable outcomes. In *Hill v. Lockhart*, 474 U.S. 52 (1985), this Court expressly recognized that the Sixth Amendment protects a defendant's right to effective assistance of counsel during the plea bargaining process. *See also Premo v. Moore*, 131 S. Ct. 733 (2011) (applying ineffective assistance of counsel test, but finding no violation, where defendant accepted a plea offer before his lawyer moved to suppress a supposedly illegally obtained confession); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480-81 (2010) (applying ineffective assistance test and finding Sixth Amendment violation where immigrant defendant pled guilty, on his lawyer's advice, to a felony that made him subject to deportation). While the law in this area is well-established and imposes a substantial burden on the defendant to show that an error by his counsel was of a constitutional dimension, the courts below correctly found that the Respondents had carried that burden.

Contrary to Petitioners' argument, a subsequent trial or plea colloquy that is consistent with Sixth Amendment norms cannot cure a constitutional violation of the right to counsel that occurred at the prior plea bargaining stage. It is the adversarial

process itself, not a trial alone, to which a defendant's Sixth Amendment right to counsel is tied. As such, an analysis of prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), focuses on whether counsel's ineffective assistance caused a breakdown in the adversarial process as a whole—not just whether the ineffective assistance prevented the defendant from ultimately receiving a fair trial.

The adversarial process breaks down where, as here, a defendant's counsel fails him anywhere in the plea process and, as a result, the defendant receives a sentence substantially greater than he otherwise would have had he not been denied his constitutional right to counsel. In such a case, reinstatement of the original plea offer comes as close as possible to redressing the constitutional harm. Such a remedy, which courts routinely grant, is constitutionally permissible and indeed is consistent with this Court's holding in *United States v. Morrison*, 449 U.S. 361, 364 (1981), that remedies for the deprivation of the Sixth Amendment right to counsel should be tailored to the injury suffered from the constitutional violation.

ARGUMENT

I. This Court Has Long Recognized That A Defendant Has A Constitutional Right To Effective Assistance Of Counsel During Plea Bargaining.

A. Plea Bargaining Is A Critical Stage Of A Criminal Prosecution.

The dominance of plea bargaining in the modern criminal justice system led two scholars to conclude that "[plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice

system." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1912 (1992) (emphasis added). The numbers certainly support that conclusion. In 1984 (the year *Strickland* was decided), the percentage of criminal convictions in federal court secured pursuant to pleas was already 87.14%. U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics*, Table 5.22.2010.[4] By 2010, of the 89,741 criminal convictions in federal district court, 97.4% (87,418) were disposed of pursuant to pleas of guilty or *nolo contendere*. *Id.* Similarly, in 2006 (the last year for which such statistics are available), 94% of all felony convictions in state courts were by guilty plea. U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics*, Table 5.46.2006.[5]

The prevalence of plea bargaining over the last several decades has fundamentally altered the modern criminal justice system. Whereas the system originally was premised on confrontation at trial, plea bargaining has supplanted the jury trial, and the full panoply of rights that follows, as the primary mode of resolving criminal prosecutions. As a result, the main function of defense counsel in the vast majority of cases has become the negotiation of an effective plea bargain.

As this Court has observed, disposition of charges through a plea is not only an essential part of the process, but a highly desirable one:

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[4] Available online at http://www.albany.edu/sourcebook/pdf/t5222010.pdf.

[5] Available online at http://www.albany.edu/sourcebook/pdf/t5462006.pdf.

> It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Santobello v. New York, 404 U.S. 257, 261 (1971). However, "all of these [benefits] presuppose fairness in securing agreement between an accused and a prosecutor." *Id.* For the plea bargaining *process* itself to be fair, as contemplated in *Santobello*, constitutionally effective assistance of defense counsel is required during that process.

In *United States v. Wade*, 388 U.S. 218 (1967), the Court explained that the right to effective assistance of counsel extended to all "critical stages" of a criminal proceeding. Not surprisingly, given its observation in *Santobello*, this Court has recognized that plea bargaining is a critical stage of a criminal prosecution: "We have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the *Sixth Amendment* right to effective assistance of counsel." *Padilla*, 130 S. Ct. at 1486 (2010) (emphasis in original); *see also Williams v. Jones*, 571 F.3d 1086, 1090-91 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 3385 ("The plea bargaining process is a critical stage of a criminal prosecution."). Because the decision to enter a guilty plea "ranks as a 'critical stage' at which the right to counsel adheres," *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), it

necessarily follows that a decision to reject a guilty plea is also a critical stage at which the right to effective assistance of counsel adheres. *See United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 438 (3d Cir. 1982) ("We have held that entering a guilty plea . . . is a critical stage . . . . It seems to us that the decision to reject a plea bargain offer and plead not guilty is also a vitally important decision and a critical stage at which the right to effective assistance of counsel attaches."). As the Supreme Court of California has similarly stated:

> Both alternate decisions—to plead guilty or instead to proceed to trial—are the products of the same attorney-client interaction and involve the same professional obligations of counsel. Application of the constitutional guarantee of effective assistance of counsel to the advice given a defendant to plead guilty necessarily encompasses the counterpart of that advice: to reject a proffered plea bargain and submit the issue of guilt to the trier of fact.

In re Alvernaz, 830 P.2d 747, 753-54 (Cal. 1992).

To achieve fair and reliable results, the criminal justice system relies upon defense counsel to effectively navigate plea negotiations and the plea process. This unquestionably includes communicating plea offers to the client as well as accurately applying the applicable law when advising the client to reject or accept a plea. A defendant who, through the error or neglect of counsel, does not accept a plea bargain that is more favorable than the conviction and sentence he ultimately receives is prejudiced when he loses the benefit of that initial bargain. Similarly, a defendant is prejudiced if, through the error or neglect of counsel, he rejects a plea, goes to

trial, and is convicted of multiple charges or charges for a higher offense. Indeed, the practice of overcharging, which commonly is employed by prosecutors to encourage defendants to settle the case through a plea, can easily prejudice a defendant who does not accept a plea offer due to counsel's ineffective performance.

Because the overwhelming majority of criminal cases are settled through the plea process, counsel's effective assistance to his client during this process is critical to the overall administration of justice. The Sixth Amendment right to counsel ensures that plea negotiations, which largely operate outside the rules of criminal procedure and the rules of evidence, result in fair and reliable outcomes. The Court's well-established precedent that a defendant must show that counsel did not exercise reasonable competence in representing him, *Strickland*, 466 U.S. at 688, is sufficiently rigorous in the plea bargaining process to prevent ineffective assistance of counsel claims from deteriorating into post-sentencing expressions of "defendant's remorse."[6] Thus, under the Court's

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[6] Indeed, the strictness of the *Strickland* standard has led many critics to argue that it undermines defendants' Sixth Amendment rights. *See* Kenneth Williams, *Does Strickland Prejudice Defendants on Death Row?*, 43 U. RICH. L. REV. 1459, 1461 (2009) (arguing *Strickland*'s prejudice prong "needs to be eliminated rather than re-tooled"); William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 93-94 (1994) (contending that the *Strickland* line of decisions has "undermined, if not virtually destroyed, the right of indigent accused" to have reasonably competent counsel and describing *Strickland* as having been "roundly and properly criticized for fostering tolerance of abysmal lawyering"). In practice, the prejudice prong of *Strickland* has served to deny relief to victims of even the most egregious forms of attorney misconduct.

decisions, not every error or neglect by counsel in the plea bargaining process is sufficient to state an ineffective assistance claim. Rather, the defendant must carry the heavy burden of showing that counsel's failure to demonstrate reasonable competence was of constitutional dimension. *See Premo*, 131 S. Ct. at 741 (holding that "strict adherence to the *Strickland* standard [is] all the more essential when reviewing the choices an attorney made at the plea bargaining stage.").

B. Contrary To Petitioners' Argument, *Strickland* And Its Progeny Recognize Forms Of Prejudice Other Than The Deprivation Of A Fair Trial.

Petitioners claim that the only cognizable form of prejudice under *Strickland* is the denial of a fair trial. Pet. State of Missouri Br. 18-25 & Pet. Lafler Br. 13-20. This position is refuted by this Court's precedent, including *Strickland* itself. *See Strickland*,

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See United States v. Voigt, 877 F.2d 1465, 1467 (10th Cir. 1989) (relief denied where counsel used Demerol throughout trial); *Curnutt v. State*, No. M2009-00346-CCA-R3-PC, 2010 WL 565670, at *7 (Tenn. Crim. App. Feb. 18, 2010) (no relief where lead counsel fell asleep at least twice during trial); *Graley v. State*, 582 So. 2d 811, 812 (Fla. Dist. Ct. App. 1991) (Garrett, J., concurring) (denied relief where counsel was under the influence of cocaine during plea negotiations); *Dorsey v. State*, 739 P.2d 528, 529-30 (Okla. Crim. App. 1987) (no relief where both trial judge and prosecutor admitted smelling alcohol on defense counsel's person). Accordingly, The Constitution Project's National Right to Counsel Committee has called for the *Strickland* standard to be replaced by a straightforward test for determining ineffective assistance of counsel that would simply ask whether the accused received "competent" and "diligent" representation, as required by the rules of professional conduct adopted by the legal profession. *Justice Denied* at 212-213.

466 U.S. at 686; (holding that a Sixth Amendment violation can occur at sentencing), *Hill*, 474 U.S. at 57 (holding that a Sixth Amendment violation can occur at the plea bargaining stage). Additionally, Petitioners' contention that a conviction at fair trial or guilty plea subsequent to a Sixth Amendment violation cures that violation is not supported by the decisions of this Court or the circuits that have considered the issue. *See Strickland* at 696 (holding that the prejudice inquiry turns on whether "the decision reached would reasonably likely have been different absent the errors"); *Williams*, 571 F.3d at 1091 (same); *Julian v. Bartley*, 495 F.3d 487, 498 (7th Cir. 2007) (same); *Wanatee v. Ault*, 259 F.3d 700, 703-04 (8th Cir. 2001) (same); *United States v. Garivia*, 116 F.3d 1498, 1514 (D.C. Cir. 1997) (per curiam) (same); *Boria v. Keane*, 99 F.3d 492, 498-99 (2d Cir. 1996) (same); *Coulter v. Herring*, 60 F.3d 1499, 1504 & n.7 (11th Cir. 1995) (same); *United States v. Brannon*, 48 Fed. Appx 51, 53 (4th Cir. 1994) (per curiam) (same); *United States v. Blaylock*, 20 F.3d 1458, 1468 (9th Cir. 1994) (same); *United States v. Day*, 969 F.2d 39, 45 (3d Cir. 1992) (same); *United States v. Rodriguez Rodriguez*, 929 F.2d 747, 751 & n.1 (1st Cir. 1991) (per curiam) (same); *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981) (same).

Under *Strickland*, to establish ineffective assistance of counsel, a defendant must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding would have been different*." *See Strickland*, 466 U.S. at 694 (emphasis added). As noted above, this Court unequivocally stated in *Hill v. Lockhart* that the Sixth

Amendment protects a defendant's right to effective assistance of counsel during the plea bargaining process. 474 U.S. at 57. Further, in *Iowa v. Tovar*, this Court explicitly confirmed that plea bargaining is a "critical stage" of criminal proceedings for Sixth Amendment purposes. *See* 541 U.S. at 80-81; *see also Premo*, 131 S. Ct. at 741. And, further eroding Petitioners' argument, plea bargaining is not the only part of a criminal proceeding outside of the trial to which the right to effective assistance of counsel attaches. Indeed, this Court has long recognized that the *Strickland* line of cases applies to criminal proceedings as a whole, not simply the actions of counsel between opening and closing statements. *See Rompilla v. Beard*, 545 U.S. 374, 380-81 (2005) (applying *Strickland* to sentencing); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (applying *Strickland* to appeals process).

It is the adversarial process as a whole, not a trial alone, that secures a defendant's Sixth Amendment rights, and a variety of errors and omissions during the process can lead to constitutional ineffectiveness. *See, e.g.*, *United States v. Cronic*, 466 U.S. 648, 656 (1984) (stating that insufficient time for trial preparation, even without any specific allegation of deficient performance, can serve as a basis for an ineffective assistance claim); *Strickland*, 466 U.S. at 686 (holding that deficient performance at a capital sentencing hearing can give rise to an ineffective assistance claim); *Morrison*, 449 U.S. at 364-65 (compiling cases in which pre-trial violations of the Sixth Amendment occurred). As such, an analysis of prejudice under *Strickland* focuses not on a particular point in a criminal prosecution at which counsel's assistance was ineffective, but rather whether the result of that ineffective assistance caused a break-

down in the adversarial process as a whole. *See Strickland*, 466 U.S. at 696 ("the ultimate focus of inquiry [in an ineffective assistance of counsel claim] must be on the fundamental fairness of the proceeding whose result is being challenged"); *see also Cronic*, 466 U.S. at 656 (announced the same day as *Strickland*, holding that "if the *process* loses its character as a confrontation between adversaries, the constitutional guarantee has been violated.)" (emphasis added); *Morrison*, 449 U.S. at 363 (the right to counsel is "fundamental to our system of justice" and is "meant to ensure fairness in the adversary criminal *process*") (emphasis added). When an attorney's incompetence robs an individual of his right to a fair, adversarial process, that individual's Sixth Amendment rights have undoubtedly been violated. *See Cronic*, 466 U.S. at 656.

All circuits that have addressed the issue have held that a defendant who rejects a plea deal as a result of his lawyer's constitutionally deficient performance and proceeds to trial has been prejudiced if the sentence he receives at trial is higher than the sentence offered in the plea deal. *See Williams*, 571 F.3d at 1091; *Julian*, 495 F.3d at 498; *Wanatee*, 259 F.3d at 703-04; *Garivia*, 116 F.3d at 1514; *Boria*, 99 F.3d at 498-99; *Coulter*, 60 F.3d at 1504 & n.7; *Brannon*, 48 F. App'x at 53; *Blaylock*, 20 F.3d at 1468; *Day*, 969 F.2d at 45; *Rodriguez Rodriguez*, 929 F.2d at 751 & n.1; *Beckham*, 639 F.2d at 267. We are aware of no federal precedent supporting Petitioners' contention that the only form of prejudice recognized under *Strickland* is the denial of a fair trial. Indeed, as the Sixth Circuit in *Lafler* stated, "[N]o federal circuit case holds so." *See Cooper v. Lafler*, 376 Fed. Appx 563, 572 (6th Cir. 2010), *cert. granted*, 131 S.

Ct. 856 (No. 10-209, 2011 Term) (quoting *Williams*, 571 F.3d at 1093).

Petitioners' argument that any ineffective assistance of counsel was remedied by the subsequent plea that Frye entered into and the trial Cooper received similarly fails. This Court in *Strickland* found that "mechanical rules" like the one Petitioners propose are inapplicable in ineffective assistance of counsel cases. 466 U.S. at 696; *see also Rose v. Mitchell*, 443 U.S. 545, 559 (1979) (rejecting the contention that a subsequent fair trial remedied a violation of the 14th Amendment caused by racial discrimination in grand jury selection). Moreover, as noted, *Strickland* stated that it is not the fairness of the trial alone, but rather of the proceedings as a whole that is dispositive. 466 U.S. at 696. At least three circuits that have considered the issue have specifically rejected the notion that a fair trial cures ineffective assistance of counsel at the plea bargaining stage. *See Blaylock*, 20 F.3d at 1466; *Day*, 969 F.2d at 44; *Rodriguez Rodriguez*, 929 F.2d at 751 & n.1. As the Third Circuit stated in *Day*, the "Sixth Amendment right to effective counsel guarantees more than the Fifth Amendment right to fair trial." 969 F.2d at 45.

In sum, a proceeding is not fundamentally fair when a defendant receives a sentence substantially greater than he otherwise would have had his constitutional rights not been violated in the plea bargaining process. This type of prejudice is cognizable under the Sixth Amendment.

C. Frye And Cooper Each Have Met The Standard For Establishing Ineffective Assistance Of Counsel As Set Forth In *Strickland*.

At a minimum, effective assistance requires informing the defendant of the existence of a plea offer and advising the defendant to reject or accept an offer based on accurate and complete information and legal analysis. *See Julian*, 495 F.3d at 497 (holding that advising a client based on a misreading of clear precedent constitutes deficient performance); *Blaylock*, 20 F.3d at 1465-66 (failure to inform defendant of a plea offer constitutes deficient performance). And, as explained above, prejudice is established when a defendant receives a significantly longer sentence than he otherwise would have absent his attorney's constitutionally deficient performance. *Caruso*, 689 F.2d at 438.

Frye's attorney's failure to convey the plea offer to his client fell below an "objective standard of reasonableness," the benchmark set by this Court for determining ineffective assistance of counsel. *See Padilla*, 130 S. Ct. at 1482 (quoting *Strickland*, 466 U.S. at 688). The Missouri Supreme Court, finding the record devoid "of *any* evidence of *any* effort" to inform Frye of the plea offer, held that the performance of Frye's attorney was constitutionally deficient under the first prong of the *Strickland* test. *Frye v. State*, 311 S.W.3d 350 (Mo. Ct. App. 2010), *cert. granted*, 131 S. Ct. 856 (2011) (emphasis in original). Other courts have similarly concluded that the failure to inform the defendant of the very existence of a plea offer constitutes deficient performance. *See, e.g., Blaylock*, 20 F.3d at 1465-66; *Rodriguez*, 929 F.2d at 752. The decision of whether to accept a plea offer was Frye's to make. The failure

to even make him aware of such an offer, however, constitutes both "a gross deviation from accepted professional standards" generally, and deficient performance of counsel under *Strickland* specifically. *Caruso*, 689 F.2d at 438.

Furthermore, Frye was clearly prejudiced by his attorney's failure to convey the plea offer when he received a three-year sentence from the court—two years longer than the maximum sentence he could have received under the plea that was never communicated to him. *Frye*, 311 S.W.3d at 352-53; *see also Caruso*, 689 F.2d at 438 (prejudice is established when a defendant receives "a significant additional term of imprisonment that resulted from counsel's failure to communicate the plea offer which he would have accepted").

Cooper was likewise denied effective assistance of counsel when his attorney incorrectly informed him that the evidence in his case could not possibly support a conviction for the crime with which he had been charged. Cooper was convicted at trial. Had Cooper accepted the plea offer, the prosecution would have recommended a sentence of between 51 to 85 months. Instead, Cooper was sentenced to a term of 185 to 360 months. *Id.* at 563, 567.

Cooper's attorney gave him advice that fell below the objective standard of reasonableness. *See Wanatee*, 259 F.3d at 704 (finding that attorney's failure to fully explain implications of felony murder rule constitutes deficient performance). The Sixth Circuit found that the claim of Cooper's attorney about the dispositive nature of a victim's injuries in determining intent under Michigan law was clearly wrong, citing multiple long-standing Michigan cases in direct opposition. *Cooper*, 376 F. App'x at 567. "Providing

such erroneous advice in the face of settled Michigan law is obviously deficient performance," the circuit court held. *See id.* Other circuits have found the deficient performance prong met when attorneys gave their clients incorrect or even incomplete advice. *Julian*, 495 F.3d at 497 (finding that the misreading of unambiguous precedent on a factor in sentencing constitutes deficient performance); *Wanatee*, 259 F.3d at 704 (finding that attorney's failure to fully explain implications of the felony murder rule constitutes deficient performance). As such, the clearly erroneous advice given by Cooper's attorney on a seminal legal point constitutes constitutionally deficient performance under the *Strickland* standard.

Cooper was prejudiced by this deficient performance. The court below found that the evidence supported Cooper's assertion that he would have pled guilty had he been fully and accurately informed of the governing law. *Cooper*, 376 F. App'x at 571-72. Cooper was prejudiced when he acted upon his attorney's erroneous statement of the law, went to trial, was convicted, and as a result received a sentence much longer than he would have absent the incorrect advice. *See Wanatee*, 259 F.3d at 704 (holding that the defendant can establish prejudice by showing "that he would have accepted the plea but for counsel's advice, and that had he done so, he would have received a lesser sentence").

In short, Frye and Cooper's Sixth Amendment rights were violated when they received ineffective assistance of counsel during the plea bargaining process. Their attorneys' performance fell well below an objective standard of reasonableness, and they were prejudiced by their attorneys' errors. *See Wanatee*, 259 F.3d at 704; *Blaylock*, 20 F.3d at 1467. As such,

both Respondents have met the well-established standard for ineffective assistance of counsel set forth by this Court in *Strickland*, and extended to the plea process in *Hill v. Lockhart*. The Court should apply that settled law and affirm the decisions below.

II. Because Indigent Defendants Plead Guilty At An Even Higher Rate Than Others, Petitioners' Proposed Standard For Prejudice Would Deprive Most Indigent Defendants Of Full Protection Under The Sixth Amendment.

For the overwhelming majority of criminal defendants whose criminal charges will be resolved through the plea process rather than trial, the need for effective assistance of counsel is greatest during plea bargaining. This is particularly true for indigent defendants who, because of a systemic lack of resources, are more likely to accept a plea bargain. *See* U.S. Department of Justice, *Defense Counsel in Criminal Cases* Table 17 (2000) (finding that federal and state prison inmates represented by court-appointed lawyers were more likely to plead guilty than those represented by private lawyers).[7]

Under Petitioners' proposed prejudice standard, the plea process itself would not be subject to the Sixth Amendment unless counsel's constitutionally inadequate representation ultimately resulted in the deprivation of a fair trial. Such a limitation on the Sixth Amendment right to counsel would fall most heavily on indigent defendants for the simple reason that they are the least likely to proceed to trial.

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[7] Available online at http://bjs.ojp.usdoj.gov/content/pub/pdf/dcce.pdf.

In *Gideon v. Wainwright*, this Court ruled that the Sixth and Fourteenth Amendments of the Constitution guarantee the provision of counsel to indigent persons accused of a crime in state felony proceedings. 372 U.S. 335 (1963). However, almost five decades later, the indigent defense system in the United States is in a state of crisis, threatening compliance with this Court's ruling in *Gideon*.[8] Defense services in criminal and juvenile cases are woefully underfunded, resulting in a system that inadequately compensates assigned counsel; pressures defendants to waive counsel; assigns incompetent or inexperienced counsel; appoints counsel late in the process; understaffs public defense offices; and fails to provide defense counsel sufficient investigative resources. As a result, many indigent defense systems fail to provide constitutionally adequate representation, and the promise of equal justice under the law remains elusive.

Inadequate funding is the most debilitating problem in the administration of indigent defense. Even before the economic downturn beginning in 2008, many states that fund their own indigent defense

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[8] The problems in indigent defense are well known and widely studied and documented in *Justice Denied*. In addition, in 2003, to commemorate the fortieth anniversary of *Gideon v. Wainwright*, the Standing Committee on Legal Aid and Indigent Defendants of the American Bar Association ("ABA") undertook to examine the state of indigent defense since *Gideon*. It held hearings at four different locations across the country to document indigent defense problems, including excessive caseloads. Numerous witnesses from several states testified. The resulting report, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (2004) (hereafter *Gideon's Broken Promise*), revealed numerous impediments in the delivery of indigent defense services.

systems (rather than relying on county funding) had actually decreased their support of these defense systems.[9] With the budget shortfalls resulting from the 2008 economic downturn, that trend can only have continued.

The inadequate funding for indigent defense systems is readily apparent when one closely examines the disparity between funding for prosecution services versus funding for indigent defense. For example, in 2007, the Spangenberg Group conducted a study in Tennessee comparing the overall resources allotted to prosecution and defense. The Spangenberg Group, *Resources of the Prosecution and Indigent Defense Functions in Tennessee* (2007).[10] The study concluded that total prosecution funding that could be attributed to indigent cases ranged between $130 and $139 million for fiscal year 2005, while funding for indigent defense totaled approximately $56.4 million. *Id.*

Because of inadequate funding, indigent defense attorneys in much of the United States are burdened with excessive caseloads. Professional rules of conduct governing lawyers require that an attorney's workload be controlled to allow for competent representation in each case. American Bar Association, Model Rules of Prof'l Conduct R. 6.1 (2007). Guidelines issued by the National Legal Aid and Defender Association (NLADA) similarly require that, prior to accepting an appointment, defense attorneys ensure they have adequate time available

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[9] *Justice Denied* at 59.

[10] Available online at http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/defender/downloads/TN_CompStudyFINAL_7_30_07.authcheckdam.pdf.

to provide quality representation. NLADA, Performance Guidelines For Criminal Def. Representation (4th Printing). In reality, however, workloads for indigent defense counsel far exceed these national standards, and excessive caseloads continue to plague indigent defense systems across the country. *See* U.S. Department of Justice, *State Public Defender Programs*, 2007 13, 18 (2009); U.S. Department of Justice, *County-based and Local Public Defenders Offices, 2007* 8 (2010).[11]

As a result of overwhelming workloads, there is increased pressure on defense attorneys representing indigents and, in turn, their clients to accept guilty pleas to expedite the movement of cases. Another byproduct of excessive workloads is error, including during the plea process, because counsel simply does not have the time or resources to perform effectively.

In *Strickland*, the Court recognized that the obligation of counsel to provide effective assistance entails "certain basic duties," including advocating the defendant's cause, demonstrating loyalty to the client, avoiding conflicts of interest, consulting with the defendant on important decisions, keeping the defendant informed of important developments, conducting reasonable factual and legal investigations, and bringing to bear the necessary skills and knowledge. 466 U.S. at 688. When lawyers handle an excessive number of cases, however, they are forced to spend their time in court as well as handling emergencies and other matters that cannot be postponed. As a result, they are unable to perform essential tasks such as client interviews, legal research, drafting

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[11] Available online at http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf.

motions, requesting investigative or expert services, interviewing witnesses, and preparing for hearings. *Gideon's Broken Promise* 19.

In Missouri, a study commissioned by the Public Defender Commission found that "excessive caseloads can and do prevent Missouri State Public Defenders from fulfilling the statutory requirements [for representations] and their ethical obligations and responsibilities as lawyers." *Justice Denied* 69 (citing The Spangenberg Group, *Assessment of the Missouri State Public Defender System* 7 (2005)). The Missouri State Public Defender Deputy Director stated that 2004 caseloads required trial public defenders to dispose of a case every 6.6 hours of every working day. *Id.* These caseloads led the Missouri Public Defender Commission in 2007 to promulgate an emergency regulation, which became permanent the following year, that would allow it to limit the ability of an overloaded district public defender office to accept additional cases. MO. CODE REGS. ANN. tit. 18, §10-4.010. Here, Frye was represented by the public defender's office of Columbia, Missouri.

Similarly, NLADA released a report regarding Michigan's public defense system in 2008, finding that, "the state of Michigan fails to provide competent representation to those who cannot afford counsel in its criminal courts." NLADA, *Evaluation of Trial-Level Indigent Defense Systems in Michigan, A Race to the Bottom* (Jun. 2008).[12] Some of the problems plaguing the system were due to excessive caseloads. *Id.* at 57-70. The Michigan Campaign for Justice concluded: "Across the state, attorneys have

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[12] Available online at http://www.michigancampaignforjustice.org/docs/Michigan%20NLADA%20report.pdf.

caseloads well above the national standards. In one county, a misdemeanor contract firm handles so many cases that the attorneys spend an average of 32 minutes per case." Cooper was indigent and represented by counsel appointed to him by the Michigan Circuit Court for Wayne County.

As noted, when attorneys have too many cases, they often are unable to comply with their professional duty to keep clients informed of the status of their case and promptly respond to client requests for information. In fact, many indigent defense attorneys do not meet with their client until the day the client enters a guilty plea and is sentenced. *Gideon's Broken Promise* 16. Testimony collected by the ABA's Standing Committee on Legal Aid and Indigent Defendants reveals just how little client contact defense attorneys have with their clients. A study of all felony cases over a five-year period in Quitman County, Mississippi showed that 42% of the indigent defense cases were resolved by guilty plea on the day of arraignment, which was the first day the attorney met the client. *Gideon's Broken Promise*, 16 & n.150 (citing testimony of Robert McDuff).

Furthermore, excessive caseloads can lead to attorney mistakes that seriously undermine a client's right to counsel. This is particularly likely when the attorney is inexperienced in the practice of criminal law. In California, a statewide survey of judges and indigent defense attorneys conducted for the California Commission on the Fair Administration of Justice found a "statistically significant correlation between having an excessive caseload and using attorneys with less than [three] years [of] experience" to handle serous felony and "three-strike" cases. *Justice Denied* 69 (quoting Laurence A. Benner and Lorena S. Stern,

Systemic Factors Affecting the Quality of Criminal Defense Representation: Preliminary Report to the California Commission on the Fair Administration of Justice 29 (2007)).[13]

Indigent defense attorneys also frequently lack access to and funding of important services such as experts, investigators, and interpreters. *Justice Denied* 93-94; *Gideon's Broken Promise* 10-11. As the Court recognized in *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985), "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and . . . a criminal trial is fundamentally unfair if the [prosecution] proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." The lack of non-lawyer services severely hampers the ability of defense attorneys to effectively negotiate a plea deal with the prosecution, especially because prosecutors have open access to the services of state and federal law enforcement and experts.

"The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strick-*

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[13] Other states report similar experiences. In Alabama, newly-minted attorneys just out of law school are reportedly just as likely as experienced attorneys to be assigned to serious cases, even homicide prosecutions. *Justice Denied* 92, n.251 (citing *Gideon's Broken Promise* at 58-62). Similarly, in 2007 in Caddo Parish, Louisiana, new public defenders with no training were assigned existing caseloads of their predecessors, regardless of prior experience. One attorney, right out of law school, started with a caseload of 270 felony drug cases. *Id.* n.257 (citing The Spangenberg Group, *Review of the Caddo Parish Indigent Defender Office* 11 (2007)).

land, 466 U.S. at 685. Because the overwhelming majority of criminal cases settle through plea bargaining, the right to counsel during plea bargaining plays a crucial role in the adversarial system. For the institutional reasons described above, however, it is indigent defendants who bear the brunt of inadequate public defense resources and the consequent ineffective representation during the plea process. Indeed, without appropriate resources and time to investigate, meet with the client, and conduct legal research, counsel cannot effectively advise a client whether to accept a plea offer.

III. The Logical Remedy For Ineffective Assistance Of Counsel During Plea Bargaining Is To Give The Defendant The Benefit Of The Lost Bargain.

In *Morrison*, 449 U.S. at 364, this Court ruled that violations of the Sixth Amendment are subject to the general rule that remedies be tailored to the injury suffered from the constitutional violation and not unnecessarily infringe on competing interests. Chief among those competing interests is society's interest in pursuing the administration of criminal justice. *Id.* There is no persuasive reason to depart from this general rule for cases involving plea negotiations. Where a defendant fails to enter a plea bargain because of the constitutionally deficient performance of his attorney, his injury is the lengthier sentence that is imposed. The remedy properly tailored to this injury is providing the defendant the benefit of the lost plea offer. As such, Frye and Cooper should be allowed to accept the original pleas because such a remedy comports with the rule set out in *Morrison*.

In *Blaylock*, 20 F.3d at 1468, the Ninth Circuit reasoned that where a defendant was deprived of the opportunity to accept a plea offer, putting him in the position he was prior to the Sixth Amendment violation usually will involve reinstating the original offer. Here, granting Frye and Cooper the option to go to trial would not remedy the deprivation of the right to counsel. Reinstatement of the original plea offer is the only remedy that comes as close as possible to redressing the constitutional harm, and doing so does not unnecessarily offend any competing interest.

Contrary to Petitioners' argument, requiring the government to reinstate its original plea offer is constitutionally permissible, and has been found so by many courts. *Santobello v. New York*, 404 U.S. at 263; *Blaylock*, 20 F.3d at 1468 (citing *Mabry v. Johnson*, 467 U.S. 504, 510 n.11 (1984)); *United States v. Partida-Parra*, 859 F. 2d 629, 635 (9th Cir. 1988). For example, in *Santobello*, the defendant was indicted on two felony counts under New York law. After negotiations, the Assistant District Attorney in charge of the case agreed to permit the defendant to plead guilty to a lesser-included offense and further agreed to make no recommendation as to the sentence. At the defendant's appearance for sentencing months later, a new prosecutor recommended the maximum sentence, which the judge imposed. The defendant appealed the sentence on the grounds that the State had promised that there would be no sentence recommendation by the prosecution. This Court found for the defendant, holding that when a guilty plea was induced based on a promise of the prosecutor, the promise must be fulfilled. *Santobello*, 404 U.S. at 262. In determining the appropriate remedy, the Court found that "the interests of justice and appropriate recognition of the duties of the

prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts" for further consideration as to whether the circumstances required that there be specific performance of the agreement on the plea, or if the defendant should be allowed to withdraw his guilty plea. *See id.* at 262-263. Either way, the Court made it clear that courts have remedial power to order that the defendant be given the benefit of the lost bargain.

Lower courts routinely require defendants to be allowed to accept a plea offer where counsel's incompetence was the reason the defendant did not accept the offer in the first place. *See Satterlee v. Wolfenbarger*, 453 F.3d 362, 370 & n.7 (6th Cir. 2006) (affirming lower court decision to release defendant after government defied conditional writ requiring reoffer of original plea agreement); *Nunes v. Mueller*, 350 F.3d 1045, 1056-57 (9th Cir. 2003) (requiring government to reoffer identical plea agreement or release defendant within 120 days); *Alvernaz v. Ratelle*, 831 F. Supp. 790, 797-99 (S.D. Cal. 1993) (requiring government to reoffer original plea deal or release defendant within 30 days).

CONCLUSION

The Court should affirm the holdings of the lower courts that Frye and Cooper received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments and remand the cases with instructions that Frye and Cooper be allowed to accept the original plea offers.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

BLAINE LAFLER,

Petitioner,

vs.

ANTHONY COOPER,

Respondent.

MISSOURI,

Petitioner,

vs.

GALIN E. FRYE,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit and the Missouri Court of Appeals

BRIEF *AMICI CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?

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BRIEF *AMICI CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* CJLF and NDAA made a monetary contribution to its preparation or submission.

constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The National District Attorneys Association (NDAA) is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7,000 members, including most of the nation's local prosecutors, assistant prosecutors, investigators, victim witness advocates, and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows and addresses public policy issues involving criminal justice and law enforcement.

Respondents' convictions in the present cases were the result of fair, reliable, and constitutionally adequate criminal proceedings. The rulings below reversed the convictions because Respondents were able to show that a more competent attorney might have obtained a more lenient sentence. These rulings, if affirmed, would significantly undermine the finality of criminal convictions and grant criminal defendants a windfall to which the Sixth Amendment does not entitle them. This result would be contrary to the rights of victims and society that CJLF was formed to protect and that NDAA's members have a duty to protect.

SUMMARY OF FACTS AND CASE

Lafler v. *Cooper*, No. 10-209

On March 25, 2003, around 7:30 in the evening, Kali Mundy was shot twice as she was running away from the assailant. *Cooper* v. *Lafler*, 376 Fed. Appx. 563, 565 (CA6 2010). She sustained life-threatening injuries, but survived. *Ibid.* Mundy identified Respondent Anthony Cooper, an acquaintance, as the shooter. *Ibid.*

Cooper was charged with several counts, including assault with intent to murder and possession of a firearm by a felon. *Ibid.* The prosecutor verbalized a plea offer to Cooper's defense attorney that would have allowed Cooper to plead guilty to assault with intent to murder and face a below-guideline minimum sentence of 51 to 85 months. *Id.*, at 566. Cooper initially wanted to accept the plea bargain "because he 'was guilty.' " *Ibid.* His attorney advised him not to accept the offer, based on a mistaken understanding of the prosecutor's burden of proof as to an assault with intent to murder charge. *Id.*, at 566, 570. Cooper subsequently rejected a less favorable offer. *Id.*, at 567. He was convicted in a jury trial and sentenced to 185 to 360 months in prison. *Ibid.*

In a post-conviction proceeding in the Michigan trial court, Cooper alleged that his trial counsel's ineffective assistance during plea bargaining had led him to reject the more favorable plea offer. *Ibid.* The trial court denied his claim, finding that "Mr. Cooper made his own choices." *Ibid.* The Michigan Court of Appeals rejected this and other claims and affirmed. The Michigan Supreme Court denied leave to appeal. *People* v. *Cooper*, 474 Mich. 905, 705 N. W. 2d 118 (2005).

Cooper then filed a petition for writ of habeas corpus in federal court alleging the same claim. *Cooper* App. to Pet. for Cert. 32a. The District Court conditionally

granted the writ, finding that Cooper's trial counsel had been ineffective and that the state appellate court's decisions holding otherwise was an unreasonable application of federal precedent. *Id.*, at 41a-42a. The court ordered the state to reoffer Cooper its original plea deal of 51 to 85 months in prison or release him. *Id.*, at 42a.

The Sixth Circuit Court of Appeals affirmed. *Cooper* v. *Lafler*, 376 Fed. Appx., at 575. Applying the two-prong test of *Strickland* v. *Washington*, 466 U. S. 668 (1984), for ineffective assistance claims, the court held that trial counsel had rendered deficient performance, that Cooper had suffered prejudice, and that the state court's decision to the contrary was objectively unreasonable. *Cooper*, *supra*, at 571-572. With respect to the prejudice inquiry, the court found that "Petitioner lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him because he was deprived of his constitutional right to effective assistance of counsel," rejecting the argument that Cooper's receipt of a fair trial foreclosed a finding of prejudice. *Id.*, at 572-573. The court also affirmed the District Court's remedy. *Id.*, at 574.

Missouri v. *Frye*, No. 10-444

On August 14, 2007, the State of Missouri charged Petitioner Galin Frye with felony driving on a revoked license following three prior misdemeanor convictions. *Frye* v. *State*, 311 S. W. 3d 350, 351 (Mo. App. 2010). A few months later, the prosecutor sent to Frye's defense counsel a written plea offer that would have given Frye the option of pleading guilty to a misdemeanor charge. *Id.*, at 351-352. Though defense counsel received the offer, it was never communicated to Frye before the offer's date of expiration. *Id.*, at 352. Frye ultimately entered an "open" guilty plea to a felony charge of

driving while revoked and was sentenced to three years in prison. *Id.*, at 352-353.

In a state post-conviction proceeding, Frye claimed ineffective assistance for counsel's failure to communicate the prosecutor's offer. *Id.*, at 353. The trial court denied the motion. *Ibid.*

The Court of Appeals of Missouri reversed. *Id.*, at 361. Applying *Strickland* to Frye's claim, the court found counsel's failure to communicate constituted deficient performance. *Id.*, at 353-356. The court further found the error prejudicial on the grounds that "but for" counsel's error, the outcome of the proceeding would have been different because Frye would have pleaded guilty to a misdemeanor and received a more lenient sentence. See *id.*, at 357-360. Recognizing that it did not have the authority to order the state to reoffer the original plea offer, the court remanded the case to allow Frye to proceed to trial, plead guilty to the charged offense, or enter into a plea bargain should the prosecution decide to offer one. *Id.*, at 360-361. The Supreme Court of Missouri denied both parties' applications for transfer from the Missouri Court of Appeals. *Frye* v. *State*, 2010 Mo. LEXIS 415 (2010), *Frye* App. to Pet. for Cert. A1.

On January 7, 2011, this Court granted certiorari in both cases. The order further provided,

> "In addition to the Questions presented by the petitions the parties are directed to brief and argue the following question: 'What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?' "

SUMMARY OF ARGUMENT

A defense attorney is the opponent of the state in a criminal proceeding. A successful claim of ineffective assistance of counsel therefore punishes the state for an error over which it has no control. Such a drastic remedy should be limited to those claims that further the purpose of the right to effective assistance.

A criminal defendant is not entitled to a plea bargain. To afford the right to a more favorable outcome via the right to effective assistance of counsel is to grant defendants a windfall the Sixth Amendment does not require.

Strickland's prejudice inquiry was tethered to notions of reliability and fundamental fairness. A mechanical application of the "outcome determinative" test for prejudice is not appropriate where a defendant is convicted as a result of fair, reliable, and constitutionally adequate proceedings. A defense counsel error that simply prevented the defendant from receiving a more favorable outcome does not warrant reversal of the conviction so long as the end result is one in which we can place confidence.

The standard for reviewing prejudice in a plea bargain accepted by the defendant, which looks at whether the defendant would have insisted upon going to trial but for counsel's error, is limited to those cases in which there are no further adjudications of guilt. Where a plea bargain offer is rejected and further fact-finding or admissions of guilt occur, those later proceedings should be reviewed for reliability and fairness when evaluating an ineffective assistance claim.

ARGUMENT

I. Overturning a judgment based on the deficiency of the opposing party's attorney is a drastic remedy, to be granted only when *Strickland*'s high standard of prejudice is met.

A. A Unique Claim.

Claims of ineffective assistance of counsel are unique in constitutional criminal procedure. For all other claims of constitutional error, an overturning of a conviction is triggered by some error committed by the state or its agents, such as passing a vague law, see *Connally* v. *General Constr. Co.*, 269 U. S. 385, 393 (1926), coercing a confession, see *Brown* v. *Mississippi*, 297 U. S. 278, 286 (1936), or withholding exculpatory evidence, see *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963). In the context of ineffective assistance of counsel, however, "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." *Strickland* v. *Washington*, 466 U. S. 668, 693 (1984).

While this Court has held that this seemingly counterintuitive result is dictated by the Sixth Amendment, see *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986), this expansion of the Sixth Amendment right to counsel should be stretched no further than necessary to protect the core purpose of the constitutional right. That purpose is to insure that counsel's representation does not "so undermine[] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U. S., at 686. The integrity of the criminal justice system is threatened when the state is forced to defend its convictions against conduct over which it has no control, and such threats should be minimized.

The remedy for a successful ineffective assistance claim is drastic, especially in light of the state's passive role. Reversing a conviction, particularly in collateral proceedings where these claims are usually litigated, is contrary to the "profound importance of finality in criminal proceedings." *Strickland*, 466 U. S., at 693-694. Such intrusions into this finality both "undermine[] confidence in the integrity of our procedures, and . . . inevitably delay[] and impair[] the orderly administration of justice." *Hill* v. *Lockhart*, 474 U. S. 52, 58 (1985) (internal quotation marks omitted).

Undoing guilty pleas also impairs the important interest in finality, as this Court reiterated this year. "Acknowledging guilt and accepting responsibility by an early plea respond to certain basic premises in the law and its function. Those principles are eroded if a guilty plea is too easily set aside . . . ." *Premo* v. *Moore*, 562 U. S. __, 131 S. Ct. 733, 741, 178 L. Ed. 2d 649, 660-661 (2011). Prosecutors may be less inclined to enter into the "complex negotiations suffused with uncertainty," if pleas are too freely overturned. See *id.*, 131 S. Ct., at 741, 178 L. Ed. 2d., at 661. Defendants could see promised leniency slip away. See *id.*, 131 S. Ct., at 742, 178 L. Ed. 2d, at 661. This lack of finality produces "a result favorable to no one." See *ibid*. The unsettling response of setting pleas aside should be limited to those cases that absolutely require it.

B. State Action.

With the exception of the Thirteenth Amendment, the federal Constitution may be invoked only to prohibit state action. 2 R. Rotunda & J. Nowak, Treatise on Constitutional Law, Substance and Procedure, § 16.1, p. 994 (4th ed. 2007). In the typical case, this limitation is not a significant issue and the triggering state action is readily apparent. *Ibid*. In those cases

that do raise the issue, where a party attempts to attribute the actions of an individual to the state, caution is prudent.

> "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. *It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.* A major consequence is to require the courts to respect the limits of their power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order." *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 936-937 (1982) (emphasis added).

Thus state action will be found only where an individual's action can "be *fairly* attributable to the State." *Id.*, at 937 (emphasis added). In the standard criminal case, the involvement of police, prosecutors, judges, or legislatures easily satisfies this requirement. A claim of ineffective assistance, however, is different. The culprit in these claims—the incompetent attorney—is immune from state supervision, and can be more accurately characterized as an opponent of the state than one whose actions are attributable to it.

C. Defense Counsel and the State.

When a defendant is able to hire his own attorney, the State has no role in the defense beyond the minimal one of regulating admission to the bar. Denial of defendant's right to choose counsel is structural error, reversible *per se*. See *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 150 (2006). When the trial court appoints counsel for an indigent defendant, the state has a role in the initial selection but virtually no control thereafter. Ineffective assistance claims are judged by

the same standard whether counsel is retained or appointed, see *Cuyler* v. *Sullivan*, 446 U. S. 335, 344-345 (1980), so the role of the state in appointing counsel cannot determine the standard to be applied in this case.

Defense counsel is the paid opponent of the state. "The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation." ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-1.2(b) (3d ed. 1993). In other words, defense counsel's duty is "to represent his client zealously within the bounds of the law." J. Burkoff, Criminal Defense Ethics § 5.1, p. 123 (2d ed. 2010) (quoting Model Code of Professional Responsibility, EC 7-19).

In *Polk County* v. *Dodson*, 454 U. S. 312 (1981), this duty of loyalty was central to the holding that a public defender's representation of a client did not fall within color of state law. That public defenders were employees of the state did not alter the traditional attorney-client relationship. " 'Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.' " *Id.*, at 318 (quoting ABA Standards for Criminal Justice 4-3.9 (2d ed. 1980)).

Nor did the fact that defense counsel is considered an officer of the court change the analysis. Our adversarial system requires defense counsel to oppose the state.

> "The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best

> serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'" *Id.*, at 318-319 (quoting *Ferri* v. *Ackerman*, 444 U. S. 193, 204 (1979)).

State effort to control the public defender's representation conflicts with the accused's Sixth Amendment right to counsel. "Implicit in the concept of a 'guiding hand' is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate." *Id.*, at 322.[2]

A successful ineffective assistance claim penalizes the state for an act over which it has no control. Not only is the state an innocent bystander throughout the process, but it is also difficult for the state to spot incompetent assistance until it is too late. "Many aspects of [defense] counsel's performance either occur outside the trial court's notice or reasonably appear to be, though they are not in fact, competent. Thus, the existence of incompetence does not necessarily imply fault on the part of the state." S. Giles, Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee, 50 U. Chi. L. Rev. 1380, 1397 (1983). Imputing counsel's error to the state forces the state to stand as an insurer against a criminal defendant's risk of incompetent counsel, thereby spreading the risk from defendants to the people through reversed convictions.

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2. The precedential value of *Polk County* is not diminished by *Georgia* v. *McCollum*, 505 U. S. 42 (1992). That case deals with the unique circumstance of defense counsel using a state-granted power to discriminate against a third person in the selection of a governmental body. *Id.*, at 52.

But criminal convictions are not accidents to be insured against, and the Sixth Amendment is not an insurance policy. While some attorney error may reasonably lead to a reversed conviction, the state cannot be required to assure an ideal trial. If counsel's error does not undermine confidence in the result, the error should not be a ground for reversal. Review of counsel's performance should not be a tool to free the guilty, but an assurance of the fundamental justice of our legal system.

Ineffective assistance litigation is a heavy burden on the criminal justice system. In noncapital cases, half of all habeas petitions claim ineffective assistance. See N. King, F. Cheesman, & B. Ostrom, Final Technical Report: Habeas Litigation in U. S. District Courts 28 (2007). Yet, of a sample of 2,384 cases, there was only *one* meritorious ineffective assistance claim. See *id.*, at 52. This burden is a necessary evil where the reliability of the result is in grave doubt. It becomes far less necessary and far more evil as the question moves farther away from reliability. The *Strickland* Court did not intend to "encourage the proliferation of ineffectiveness challenges," 466 U. S., at 690, but that is exactly what it did. To place some limits on this proliferation, *Strickland's* prejudice inquiry must be precisely and narrowly construed.

II. A plea bargain is a windfall to which a criminal defendant is not entitled.

Guilty pleas would be unnecessary "in an ideal world." See *Blackledge* v. *Allison*, 431 U. S. 63, 71 (1977). Nevertheless, they have become "important components of this country's criminal justice system," *ibid.*, and should be encouraged to avoid the need "to multiply by many times the number of judges and court

facilities" that would be required if every case went to trial. See *Santobello* v. *New York*, 404 U. S. 257, 260 (1971). Indeed, plea bargaining is now " 'the dominant force in criminal procedure.' " 5 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 21.1(b), p. 523 (3d ed. 2007) (quoting G. Fisher, Plea Bargaining's Triumph: A History of Plea Bargaining in America 230 (2003)).

Numerous explanations for the growth of plea bargaining have been offered, including more particularized case selection by law enforcement and prosecutors, the increasingly burdensome jury trial process, and sentencing law changes that threaten bigger and more certain penalties. See LaFave § 21.1(b), at 524-525. The most important justification, however, is dealing with overburdened court calendars. See *id.*, at 526.

The institution of plea bargaining and guilty pleas, therefore, is born from the interest in judicial efficiency, not any entitlement of a criminal defendant. Despite their advantages, plea bargains are not a required step in a criminal proceeding. This Court has made clear that "there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial." *Weatherford* v. *Bursey*, 429 U. S. 545, 561 (1977).

A plea bargain that offers a less-than-required penalty, see, *e.g.*, *Premo* v. *Moore*, 562 U. S. __, 131 S. Ct. 733, 741, 178 L. Ed. 2d 649, 661 (2011), is a windfall to a defendant. A defendant who loses a windfall has not been deprived of anything to which he was entitled.

III. *Strickland's* "reasonable probability" test for prejudice is a specific test that does not apply in every situation.

A. Reliability.

Since its inception, the right to the effective assistance of counsel has been based on the unreliability of trial without counsel. The *Strickland* Court noted that, because the right to the effective assistance of counsel is born from the Sixth Amendment, "we must take its purpose—to ensure a fair trial—as the guide." *Strickland* v. *Washington*, 466 U. S. 668, 686 (1984); see also *Lockhart* v. *Fretwell*, 506 U. S. 364, 368-369 (1993). "Thus, 'the right to effective assistance is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'" *Fretwell*, *supra*, at 369 (quoting *United States* v. *Cronic*, 466 U. S. 648, 658 (1984)). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, *supra*, at 686.

Ensuring the reliability of results materialized in the form of *Strickland's* prejudice prong. "[T]he defendant must show . . . that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is *reliable*." *Id.*, at 687 (emphasis added). The claim before the Court in *Strickland* was a fairly typical one—counsel failed to investigate and present some mitigating evidence at trial. See *id.*, at 699-700. With this scenario in mind, the Court explained its "reliable result" principle by borrowing a standard from other rules dealing with omitted evidence. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See *id.*, at 694

(citing *United States* v. *Agurs*, 427 U. S. 97, 104 (1976) (information not disclosed by prosecutors); *United States* v. *Valenzuela-Bernal*, 458 U. S. 858, 872-874 (1982) (deported witness)).

The *Strickland* Court made clear, however, that this test was not an end in itself but only the means to implement the general principle of reliability.

> "Although these principles [on the probability of a different outcome] should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." 466 U. S., at 696.

The key focuses are reliability and confidence that the result is just. See *ibid.* In some contexts, the test of whether there is a "reasonable probability" the result "would have been different" is not the appropriate standard for implementing the principle underlying the right to effective representation.

> "It is true that while the *Strickland* test provides sufficient guidelines for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis. Thus, on the one hand, as *Strickland* itself explained, there are a few situations in which prejudice may be presumed. 466 U. S., at 692. And, on the other hand, there are also situations in which it would be unjust to characterize the likelihood of a different

outcome as legitimate 'prejudice.'" *Williams* v. *Taylor*, 529 U. S. 362, 391-392 (2000).

B. Exceptions to the Different Result Test.

The first exception is that in assessing the "likelihood of a result more favorable to the defendant . . . [a] defendant has no entitlement to the luck of a lawless decisionmaker." *Strickland*, 466 U. S., at 695. The reviewing court must also "exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like," or the "idiosyncrasies of the particular decisionmaker, such as the unusual propensities toward harshness or leniency." *Ibid.* Even if counsel could have employed a different strategy with these considerations in mind, and even if this could have indeed achieved a more favorable result for the defendant, these possibilities are simply "irrelevant to the prejudice inquiry." *Ibid.*

Jury nullification provides the starkest example. Defense counsel's failure to make a pitch for jury nullification, even if doing so would have gotten the defendant off altogether, does not reflect an *unreliable* result. The defendant certainly did not enjoy the most advantageous outcome, but that is far different from receiving an unfair proceeding.

Application of the "different result" standard to a result achieved by perjured testimony similarly would not further the "ultimate focus" on fairness and reliability. During his trial for fatally stabbing to death a man over a drug dispute, Emmanuel Whiteside sought to lie on the stand to corroborate a theory of self defense, but his attorney refused to let him. *Nix* v. *Whiteside*, 475 U. S. 157, 160-161 (1986). The Eighth Circuit deemed this ineffective assistance of counsel. *Id.*, at 163.

The *Nix* majority devotes most of the opinion to *Strickland's* deficient performance inquiry, and its discussion of the prejudice prong is consequently brief. Noting that "Whiteside has no valid claim that confidence in the result of his trial has been diminished by his desisting from the contemplated perjury," *id.*, at 175, the majority concludes, "Even if we were to assume that the jury might have believed his perjury, it does not follow that Whiteside was prejudiced." *Id.*, at 175-176.

Justice Blackmun's concurring opinion expands on this point. He would have denied the claim solely on the prejudice ground, effectively holding that Whiteside had no claim, even if his lawyer's performance did fall below the Sixth Amendment thresholds. To reach this result, the concurrence returns to the underlying principle of the *Strickland* prejudice component. "The touchstone of a claim of prejudice is an allegation that counsel's behavior did something to 'deprive the defendant of a fair trial, a trial whose result is reliable.'" *Id.*, at 184 (quoting *Strickland*, 466 U. S., at 687). The appropriate question, therefore, was whether the Court's "confidence in the outcome of Whiteside's trial is in any way undermined by the knowledge that he refrained from presenting false testimony," to which an answer in the positive is "simply untenable." *Id.*, at 185. This is true, Justice Blackmun makes quite clear, *even if* the false evidence might have changed the result. *Id.*, at 186. It is therefore not a universal rule that any alleged error by defense counsel throughout criminal proceedings which may have had a reasonable probability of changing the result satisfies *Strickland's* prejudice prong. The Court unanimously rejected Whiteside's prejudice claim even assuming the result would have been different. *Id.*, at 175-176 (majority); *id.*, at 186-187 (concurrence).

In *Kimmelman* v. *Morrison*, 477 U. S. 365 (1986), Morrison's trial counsel moved for the exclusion of evidence on the grounds that it had been illegally seized, but he missed the deadline, and the motion was denied as untimely. *Id.*, at 368-369. When the federal courts granted habeas relief for ineffective assistance of counsel, the state petitioned for certiorari, asking that *Stone* v. *Powell*, 428 U. S. 465 (1976), which excluded Fourth Amendment exclusionary rule claims from reconsideration on federal habeas corpus, be extended to ineffective assistance claims where the underlying error is based on the exclusionary rule. See *Kimmelman*, 477 U. S., at 368. The Court unanimously rejected this request. *Id.*, at 382-383 (majority); *id.*, at 391 (Powell, J., concurring in the judgment).

The discussion of the "reliability" component of prejudice in *Nix*, however raises another question that could have been argued in *Kimmelman* but was not. "The more difficult question is whether the admission of illegally seized but reliable evidence can ever constitute 'prejudice' under *Strickland*." *Id.*, at 391 (Powell, J., concurring in the judgment). Justice Powell pointed to *Strickland's* "ultimate focus of inquiry" on fundamental fairness and reliability, and reasoned that a conviction obtained by illegally-seized evidence does not amount to an "unjust or unfair verdict." *Id.*, at 395-396. On the contrary, such a verdict is perhaps *more just* than a decision reached by a partially uninformed jury, from which the exclusionary rule shielded relevant and incriminating evidence. See *id.*, at 396. The only "harm" suffered by a defendant under these circumstances is the "absence of a windfall." *Ibid.* To say that the Sixth Amendment right to effective assistance of counsel protects criminal defendants from this harm "would shake that right loose from its constitutional moorings." *Id.*, at 397. *Kimmelman* did not resolve the *Strickland* prejudice argument, however, because the

State did not raise it. See *ibid.* The issue "remains an open one," *id.*, at 398, to this day.

In *Lockhart* v. *Fretwell*, *supra*, the Court identified another variation to be excluded from the "different result" standard—defense counsel's failure to make an objection that, though it might have been accepted at the time of trial, is known to be meritless at the time the ineffective assistance claim is decided. See 506 U. S., at 374 (O'Connor, J., concurring). In that case, Fretwell's attorney failed to object to the Arkansas jury's consideration of a certain aggravating factor during the sentencing phase. *Id.*, at 366-367. Fretwell argued that, had counsel made the objection, it would have been sustained under then-existing Eighth Circuit precedent.[3] See *id.*, at 367. By the time Fretwell's ineffective assistance claim reached the Eighth Circuit, however, that court had overruled the precedent, recognizing that counsel's omitted objection would have been meritless. See *id.*, at 368.

Returning to *Strickland's* underlying notions of fairness and reliability, the Court determined the "different result" standard, without more, was inappropriate to determine whether prejudice was established. "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Id.*, at 369; see also *id.*, at 372; *Glover* v. *United States*, 531 U. S. 198, 202 (2001) ("*Lockhart* holds that in some circumstances a mere difference in outcome will not suffice to establish prejudice). Be-

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3. The Arkansas trial court was not bound to follow Eighth Circuit precedent, however. See *id.*, at 375-376 (Thomas, J., concurring); *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 58-59, n. 11 (1997) (citing *Fretwell* concurrence and referring to contrary Ninth Circuit passage as "remarkable").

cause the alleged error in this case merely "deprived [Fretwell] of the chance to have the state court make an error in his favor," 506 U. S., at 371 (quoting Brief for United States as *Amicus Curiae* 10), as a matter of law he suffered no prejudice. See *id.*, at 372.

C. Right to Effective Assistance Versus Right to Reversal.

There is no question that a defendant is entitled to the "guiding hand of counsel at every step in the proceedings . . . ." *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932). *Strickland*'s prejudice component addresses the question of whether an error is grounds for reversal. The prejudice discussions in *Nix*, *Kimmelman*, and *Strickland* itself demonstrate that an unprofessional error, even one that satisfies the "different result" standard, does not always warrant reversal.

In *Strickland*, there was no dispute that the omitted evidence, although weak, was relevant and admissible. See 466 U. S., at 676-677. In these circumstances, the only issue regarding the reliability of the result was whether admission of that evidence would have made a difference. See *id.*, at 699-700.

In *Kimmelman*, the admissibility of the evidence was hotly disputed, though its veracity and relevance were not. As a result, *Kimmelman* added to *Strickland*'s "reasonable probability" requirement a condition that the disputed evidence actually be inadmissible. 477 U. S., at 390-391. Justice Powell believed that the entire category of Fourth Amendment exclusion claims did not jeopardize the fairness and reliability of the results, because the defendant was not denied "a fair and reliable adjudication of his guilt." *Id.*, at 396. This issue remains unresolved, although Justice Powell's discussion has been favorably cited by the Court twice

since then. See *Fretwell*, 506 U. S., at 372; *Williams*, 529 U. S., at 393, n. 17 (quoting *Fretwell*).

The evidence in *Nix* lies at the opposite end of the spectrum from the evidence in *Strickland*. Lying under oath is not merely an error, it is a felony. No one could reasonably contend that a trial where a defendant is restrained from lying is thereby rendered less reliable or less likely to produce a just result. See *Nix*, 475 U. S., at 185 (Blackmun, J., concurring in the result). Where introducing evidence would be wrong, omitting that evidence cannot be prejudicial, regardless of whether it might have changed the result.

The question in these cases is not whether the defendant was deprived of a "sporting chance." See *Brady* v. *Maryland*, 373 U. S. 83, 90 (1963). It is only whether there is reason to lack confidence in the result. See *Strickland*, 466 U. S., at 691-692. The scope of reversible error is therefore narrower than the scope of the defendant's right to effective assistance. Even where an effective lawyer could have "gotten him off" by causing the system to malfunction in some way, the defendant is nevertheless not entitled to a reversal.

Where a defendant voluntarily, intelligently, and knowingly, see *Brady* v. *United States*, 397 U. S. 742, 748 (1970), enters into a guilty plea, or where a criminal defendant receives a fair adjudication of guilt during a criminal trial, there is no "breakdown in the adversarial process that our system counts on to produce just results." See *Strickland*, 466 U. S., at 696. The reliability of the result is not shaken by a claim that a more effective attorney could have achieved an outcome more favorable to the defendant. Such a strict outcome-determinative inquiry would ignore the principle underlying *Strickland*—"the ultimate focus of inquiry . . . on the fundamental fairness of the proceeding whose result is being challenged." See *ibid*. To

overturn a reliable result by rigid adherence to *Strickland*'s "different result" standard under these circumstances is, in effect, granting the defendant a "windfall." See *Fretwell*, 506 U. S., at 366. The Sixth Amendment does not require such a result.

IV. Deficient performance during plea bargaining that renders a possibly unreliable result is distinguishable from the circumstances presented here.

Adhering to *Strickland*'s underlying notions of fundamental fairness and reliability will not always foreclose a defendant from successfully claiming ineffective assistance during the plea bargaining stage. The prejudice inquiry may still be satisfied, and relief warranted, where counsel's deficiency produces a result in which we cannot place confidence.

In *Hill* v. *Lockhart*, 474 U. S. 52 (1985), Hill pleaded guilty to first-degree murder. *Id.*, at 53. He sought federal habeas relief years later, claiming ineffective assistance for counsel's failure to inform him correctly of his parole eligibility prior to his guilty plea. *Id.*, at 54-55. Applying the regular *Strickland* test to Hill's claim, the Court explained that the prejudice inquiry in the context of guilty pleas is whether "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*, at 59. Because Hill had not shown that his mistaken belief about his parole eligibility date was a significant reason for foregoing trial, he failed to satisfy the prejudice prong. *Id.*, at 60.

In *Padilla* v. *Kentucky*, 559 U. S. __, 130 S. Ct. 1473, 1483, 176 L. Ed. 2d 284, 296 (2010), counsel's failure to advise the defendant of the deportation consequences of a guilty plea was deemed deficient performance. The

Court remanded the case for an evaluation of the prejudice inquiry. See *id.*, 130 S. Ct., at 1483-1484, 176 L. Ed. 2d, at 296. Although *Padilla* did not spell out the nature of that inquiry, the clear implication is that the *Hill* standard applies. See *id.*, 130 S. Ct., at 1485, 176 L. Ed. 2d, at 297.

Under circumstances such as those just described, reliability is lacking where a defendant, reasonably relying on counsel's error, pleads guilty and foregoes his or her Sixth Amendment right to a trial. A showing that the defendant had a reasonable chance of prevailing at trial cannot be required because that determination could not be made without trying the underlying case within the habeas proceeding. We cannot have confidence in the result when counsel's deficient performance is potentially the primary reason for the result, as opposed to a jury verdict following a full and fair trial or a defendant's fully-informed decision to plead guilty. Such a result lacks the "fundamental fairness" emphasized in *Strickland*.

But such reasoning is inapposite in the present cases, as Respondents did not waive their right to trial in reliance on counsel error. Their convictions were obtained as a result of fair, reliable, and constitutionally adequate criminal proceedings, and any alleged error in prior negotiations does not tarnish that result. Under these circumstances, counsels' alleged deficient performance had no impact on the fairness of the proceedings. The fundamental fairness and reliability of the result remain intact, and that is all the Sixth Amendment requires. See *Strickland*, 466 U. S., at 696.

Smith v. *Robbins*, 528 U. S. 259 (2000), and *Roe* v. *Flores-Ortega*, 528 U. S. 470 (2000), provide an informative contrast in this regard. Robbins had an appeal and was represented by appellate counsel who found no issues to brief. *Robbins*, *supra*, at 267. To establish

prejudice, Robbins had to show a reasonable probability that he would have prevailed on appeal had a brief been field. See *id.*, at 285. Flores-Ortega, in contrast, had no appeal because trial counsel did not file the requisite notice. See *Flores-Ortega*, *supra*, at 474. Following *Hill*, the Court decided that "prejudice" meant only "a reasonable probability that . . . he would have appealed," *id.*, at 484, not that he would have prevailed on appeal. See *id.*, at 486. The difference in the two cases is between "a judicial proceeding of disputed reliability [and] the forfeiture of a proceeding itself." *Id.*, at 483.

The contrast between the present cases and *Hill* is even sharper than the contrast between *Robbins* and *Flores-Ortega*. In these cases not only have defendants not "forfeit[ed] a judicial proceeding to which [they were] otherwise entitled," *id.*, at 485, they do not, at this point, even challenge the reliability of the proceedings that did result in their convictions.

* * *

The question added by the Court in both of these cases is, "What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?" The answer, *amici* submit, is none. "To hold otherwise would grant criminal defendants a windfall to which they are not entitled." *Fretwell*, 506 U. S., at 366.

CONCLUSION

The decisions of the United States Court of Appeals for the Sixth Circuit and the Court of Appeals of Missouri should be reversed.

April, 2011

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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Nos. 10-209 & 10-444

IN THE

Supreme Court of the United States

BLAINE LAFLER,
Petitioner,
v.
ANTHONY COOPER,
Respondent.

MISSOURI,
Petitioner,
v.
GALIN E. FRYE,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit and the Supreme Court of Missouri

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, CONNECTICUT CRIMINAL DEFENSE LAWYERS ASSOCIATION, AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL"), the Connecticut Criminal Defense Lawyers Association ("CCDLA"), and the American Civil Liberties Union Foundation ("ACLU") as *amici curiae* in support of respondents in both *Lafler v. Cooper*, No. 10-209, and *Missouri v. Frye*, No. 10-444.[1]

NACDL is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs in criminal cases in this Court and other courts.

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

CCDLA, an affiliate of NACDL, is a not-for-profit organization of approximately three hundred lawyers who are dedicated to defending persons accused of criminal offenses. Founded in 1988, CCDLA is the only statewide criminal defense lawyers' organization in Connecticut.

The ACLU is a nationwide nonprofit, nonpartisan organization with over 550,000 members, dedicated to the defense and promotion of the guarantees of individual rights and liberties embodied in the Constitution.

SUMMARY OF ARGUMENT

The decisions of the lower courts in both *Lafler* and *Frye* are correct. The Sixth Amendment is violated when a defendant forgoes a plea due to ineffective assistance of counsel and is then convicted and receives a more severe sentence than would have resulted from the plea. Neither a subsequent trial nor a less favorable plea can cure that violation or undo the prejudice suffered from the counsel's deficient performance. Instead, courts must fashion a remedy that places the parties as close as possible to the position they were in before the ineffective assistance occurred.

Amici emphasize three points. First, plea bargaining occupies a central role in the criminal justice system, with the overwhelming majority of criminal cases in state and federal court resulting in guilty pleas. Given the predominance of plea bargaining and this Court's recognition that it is a "critical stage" of the proceedings, the Sixth Amendment requires that defendants receive effective assistance of counsel when considering whether to accept a plea, and it requires a remedy when a defendant can es-

tablish that he received ineffective assistance under the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

Next, when faced with a Sixth Amendment violation in the context of a forgone plea, courts must fashion a remedy that "neutralize[s] the taint [and] tailor[s] relief appropriate in the circumstances." *United States v. Morrison*, 449 U.S. 361, 365 (1981). The various approaches employed by the lower courts demonstrate that it is possible to craft a remedy that addresses the prejudice caused by the constitutional violation—i.e., a harsher conviction and sentence than the defendant would have received absent the violation—and puts the parties as close as possible to the position they occupied before the ineffective assistance was rendered.

Finally, recognizing a remedy in the forgone-plea context will not encourage defense counsel to engage in "sandbagging" by failing to convey (or convey adequately) plea offers, nor will it "open the floodgates" of habeas litigation. Defense attorneys, just like prosecutors, are members of the bar and officers of the court, and it is both preposterous and insulting to suggest that they would deliberately engage in ineffective assistance. Nor is there any reason to believe that recognizing a remedy in this context will result in a cavalcade of frivolous habeas litigation. Indeed, the state and federal courts have been recognizing and remedying these claims for three decades without being overwhelmed by them.

ARGUMENT

I. THE SIXTH AMENDMENT GUARANTEES EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA NEGOTIATIONS

A. Plea Negotiations Are A Critical Stage Of The Criminal Trial Process

Plea negotiations are "a defining, if not the defining, feature" of the contemporary American criminal justice system. Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 Am. Crim. L. Rev. 1063, 1064 (2006). In the most recent years for which data is available, approximately 97% of federal and 94% of state convictions were the result of guilty pleas. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, tbl. 5.22.2009;[2] Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006 – Statistical Tables* 1 (Dec. 2009).[3] This Court has repeatedly noted the predominance of plea bargaining in criminal adjudications, recently observing that "[p]leas account for nearly 95% of all criminal convictions." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010); *see also Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009).

In a system where the overwhelming majority of criminal cases are resolved through pleas, the decision to plead guilty is "ordinarily the most important

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[2] *Available at* http://www.albany.edu/sourcebook/pdf/t5222009.pdf.

[3] *Available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fsac06st.pdf.

single decision in any criminal case." Anthony G. Amsterdam, *Trial Manual for the Defense of Criminal Cases* § 201 (4th ed. 1984); *see also Brady v. United States*, 397 U.S. 742, 748 (1970) ("That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized."). It follows from this that "[t]he most important service that criminal defense lawyers perform . . . is advising [the defendant] whether to plead guilty and on what terms." Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 698 (2002).

B. A Sixth Amendment Violation In Plea Bargaining Necessarily Entails Prejudice To The Defendant

Given the centrality of plea negotiations in the criminal justice system, it is no surprise that this Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla*, 130 S. Ct. at 1486; *see also Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978) (noting that the Court has "recognize[d] the importance of counsel during plea negotiations"). The Sixth Amendment guarantee of effective assistance during plea negotiations stems from the long-standing recognition that a defendant "requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

In order to establish a claim of ineffective assistance of counsel during a "critical stage" of a criminal proceeding, the defendant must show that his

counsel's performance "fell below an objective standard of reasonableness," and that he suffered prejudice as a result of the deficient performance. *Strickland*, 466 U.S. at 687-88, 694. To establish prejudice, the defendant need only show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In *Hill v. Lockhart*, 474 U.S. 52 (1985), this Court confirmed that the two-part *Strickland* test was "applicable to ineffective-assistance claims arising out of the plea process." *Id.* at 57. The Court explained that in determining whether the prejudice prong is satisfied, the focus should be "on whether counsel's constitutionally ineffective performance affected the *outcome of the plea process*." *Id.* at 59 (emphasis added).

Where, as in respondents' cases, counsel's deficient performance causes a criminal defendant to reject the prosecution's offer of plea that he would have otherwise accepted, the ineffective performance necessarily "affect[s] the outcome of the plea process." *Hill*, 474 U.S. at 59. And where the defendant can show, as respondents have done, that "he would have accepted the plea but for counsel's advice, and that had he done so he would have received a lesser sentence," the prejudice prong of *Strickland* is satisfied. *Wanatee v. Ault*, 259 F.3d 700, 703-04 (8th Cir. 2001); *see also Carmichael v. People*, 206 P.3d 800, 807 (Colo. 2009) (holding that the test for prejudice is "a reasonable probability that, but for counsel's errors, [the defendant] would have accepted the plea offer rather than going to trial"). In other words, respondents have shown that, as a result of the defi-

cient performance, they were denied the opportunity to accept a plea that would have resulted in convictions for lesser offenses, and much shorter sentences, than they received as a result of the trial and/or subsequent plea.

This Court has already held that "any amount of actual jail time has Sixth Amendment significance" when evaluating *Strickland*'s prejudice prong. *Glover v. United States*, 531 U.S. 198, 203 (2001). In this way, the result of the proceedings against both respondents was irrevocably tainted by their counsels' constitutionally deficient performance at the plea stage. Simply put, they received much more jail time than they would have but for the constitutional violation that occurred in the plea process. That result is incompatible with this Court's Sixth Amendment jurisprudence.

Petitioners and the United States suggest that because criminal defendants do not have a right to a plea bargain, a defendant who forgoes a plea due to ineffective assistance has not been deprived of any "'substantive or procedural right to which the law entitles him.'" *Lafler* Pet. Br. at 21 (quoting *Williams v. Taylor*, 529 U.S. 362, 393 n.17 (2000)); *see also Lafler* U.S. Br. at 18-19; *Frye* U.S. Br. at 18-19. That argument is incorrect. The question is not whether a criminal defendant has a right to engage in plea negotiations or ask for a plea bargain. The question is whether, when the prosecution has decided to offer a plea, the defendant has a right to have his counsel inform him of that offer and provide reasonable information about the consequences of accepting or rejecting it. That right has been clearly and consistently recognized by this Court. *See*

Padilla, 130 S. Ct. at 1480-81 ("Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel."); *Libretti v. United States*, 516 U.S. 29, 50 (1995) ("[I]t is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement."); *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."); *Strickland*, 466 U.S. at 688 (explaining counsel's "dut[y] to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution"). Where defense counsel is derelict in those duties, and the defendant forgoes a favorable plea as a result, the defendant has established ineffective assistance of counsel under *Strickland*'s two-prong test.

Petitioners and the United States also suggest that a defendant who forgoes a plea as a result of deficient counsel cannot establish prejudice under *Strickland* because he cannot show that the prosecutor would not have withdrawn the offer or that the court would have accepted the plea. *See, e.g.*, *Lafler* U.S. Br. at 19-21. But under *Strickland*, a defendant is only required to show a "reasonable probability" that counsel's deficient performance affected the outcome of the proceeding. 466 U.S. at 694. Where a prosecutor has offered a plea agreement and there is no indication in the record that it would have been withdrawn or that the court would not have accepted it, there is at least a "reasonable probability" that

the defendant would have successfully pled guilty in accordance with the plea offer.

II. THE LOWER COURTS CAN AND MUST FASHION APPROPRIATE RELIEF TO REMEDY INEFFECTIVE ASSISTANCE AT THE PLEA STAGE

"Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Morrison*, 449 U.S. at 364. The court must "identify and then neutralize the taint by tailoring relief appropriate in the circumstances." *Id.* at 365.

As discussed *supra* in Part I.B, the "injury suffered" in a forgone plea is a conviction and/or sentence more severe than the defendant would have received had the defendant been appropriately counseled and accepted the plea. That outcome is not a "just result[]," *Strickland*, 466 U.S. at 685, because it would not exist absent counsel's "constitutional deficiency," *Padilla*, 130 S. Ct. at 1482. In order to "neutralize th[at] taint," courts must fashion a remedy that places the defendant as close as possible to the position he would have occupied absent the ineffective assistance. *See Morrison*, 449 U.S. at 365.

The court reviewing the ineffective-assistance claim is in the best position to consider the particular circumstances of the case and fashion a remedy that "neutralize[s] the taint" without unduly infringing on competing interests. *Morrison*, 449 U.S. at 365. Various considerations—including the procedural posture of the case, the offense of conviction compared to the offense at issue in the plea offer,

and the factual circumstances surrounding the plea offer—will factor into the calculus of an appropriate remedy. In some cases, the most efficient course to "neutralize the taint" could be to fashion a remedy that approximates the original plea offer, such as by reducing the sentence or conditionally vacating the conviction unless the prosecutor reoffers the original plea or reopens plea negotiations. In other cases, the appropriate remedy might be to vacate the conviction and remand for a new trial (with the possibility of new plea negotiations). Each of these is a constitutionally permissible remedy, and the choice between them should be within the discretion of the court, guided by the parties' recommendations as to an appropriate remedy on the facts of the case.

A. Trial Courts Are Best Situated To Select A Remedy Appropriate To The Circumstances

This Court has previously recognized that the appropriate remedy for malfeasance at the plea stage will depend on the particular circumstances of the case, and that lower courts are best suited to make this determination. *See Santobello v. New York*, 404 U.S. 257, 262-63 (1971). In *Santobello*, the Court considered the appropriate remedy to be imposed after the prosecution breached a plea agreement with the defendant. Rather than selecting a particular remedy, the Court remanded the case, concluding that "[t]he ultimate relief to which petitioner is entitled" should be left "to the discretion of the state court, which is in a better position to decide whether the circumstances" of the case necessitated specific performance of the plea agreement or the opportunity for the defendant to withdraw his plea

entirely. *Id.* at 263.

Just as in *Santobello*, the court reviewing the ineffective-assistance claim is in the best position to craft a remedy that addresses the "injury suffered from the constitutional violation" without "unnecessarily infring[ing] on competing interests." *Morrison*, 449 U.S. at 364. Indeed, the variety of approaches developed by state and federal courts confirms that courts are capable of fashioning appropriate remedies for ineffective assistance in the forgone-plea context.

For example, in a case where the offense of conviction is the same as the offense at issue in the forgone plea and the difference is the sentence imposed, the most efficient remedy may be to reduce the sentence to what it would have been under the plea agreement rather than vacate the conviction and remand for further proceedings. *See Becton v. Hun*, 205 W. Va. 139, 145 (W. Va. 1999) ("Because the Appellant's trial outcome and plea offer both resulted in a conviction of one count of aggravated robbery, we conclude that specific performance of the sentencing portion of the plea agreement proposal wherein the State would recommend a ten-year sentence is the appropriate remedy in this case."); *see also Jiminez v. State*, 144 P.3d 903, 907 (Okla. Crim. App. 2006) (same).

In other cases, the court could consider vacating the conviction and requiring reinstatement of the original plea agreement, *see, e.g.*, *Hoffman v. Arave*, 455 F.3d 926, 942-43 (9th Cir. 2006); *United States v. Blaylock*, 20 F.3d 1458, 1469 (9th Cir. 1994), or vacating and remanding for plea negotiations with a presumption of prosecutorial vindictiveness for any

plea offer less favorable than the original, *see, e.g.*, *Magana v. Hofbauer*, 263 F.3d 542, 553 (6th Cir. 2001). In those situations, the prosecutor is free to "seek to demonstrate that intervening circumstances have so changed the factual premises of its original offer that, with just cause, it would have modified or withdrawn its offer prior to its expiration date." *Blaylock*, 20 F.3d at 1468-69.[4]

Finally, a court could vacate the conviction and remand for a new trial, leaving available the possibility that parties will simply re-negotiate a plea, whether or not precisely the same as before. *See, e.g.*, *Riggs v. Fairman*, 399 F.3d 1179, 1184 (9th Cir. 2005); *United States v. Gordon*, 156 F.3d 376, 381-82 (2d Cir. 1998). Vacatur at least "places the defendant at a stage in the proceedings prior to the point at which he or she failed to receive the effective assistance of counsel." *State v. Lentowski*, 569 N.W.2d 758, 762 (Wis. Ct. App. 1997). And vacatur is the very minimum necessary to remedy the core Sixth Amendment violation, which, as discussed, is counsel's deficient plea performance resulting in a conviction and/or sentence more severe than would have occurred in the absence of the deficient performance. Vacatur of the harsher conviction and/or longer sentence resulting from the violation thus should follow as a matter of course once the violation itself is es-

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[4] The possibility of a post-acceptance withdrawal of the plea does not negate a finding of prejudice, which requires a showing only of a "reasonable probability" that but for defense counsel's ineffective assistance, the defendant would have accepted the plea. *See, e.g.*, *Riggs v. Fairman*, 178 F. Supp. 2d 1141, 1153 (C.D. Cal. 2001), *aff'd*, 399 F.3d 1179 (9th Cir. 2005). It may nevertheless be a consideration in determining what the appropriate remedy should be on the facts of the case. *Id.*

tablished, unless one of the other options better fits the circumstances of the case.

B. Petitioners' And The United States' Counter-Arguments Are Unavailing

Petitioners and the United States contend that because no one remedy is necessarily appropriate for every case, the Sixth Amendment violation should simply go unremedied in all cases. *See Lafler* Pet. Br. at 22-26; *Lafler* U.S. Br. at 24-32; *Frye* U.S. Br. at 25-32. But this Court recognized in *Santobello* that there can be a range of constitutionally appropriate remedies for a particular violation, and it concluded that lower courts are competent to select a remedy that best suits the circumstances of the case. *See* 404 U.S. at 262-63; *id.* at 268-69 (Marshall, J., concurring in part and dissenting in part); *see also Mabry v. Johnson*, 467 U.S. 504, 511 n.11 (1984).

The same is true here. Depending on the unique circumstances of the case, the appropriately tailored remedy might be specific performance of the plea agreement, or it might be vacatur of the conviction and remand for a new trial. The United States' objections to these remedies merely confirms that no one remedy will be appropriate in every case, and thus courts should have discretion to fashion a remedy that "neutralize[s] the taint" of the constitutional violation without "unnecessarily infring[ing] on competing interests." *Morrison*, 449 U.S. at 365.

1. The United States contends that a specific performance remedy is inappropriate because it gives the defendant the benefits of the original plea offer, without recognizing the risk that the prosecution could have revoked it or the trial court could have rejected it before it came to fruition. *See Lafler*

U.S. Br. at 28; *Frye* U.S. Br. at 29. But, as explained *supra*, courts can and do consider the possibility of post-acceptance withdrawal or trial-court rejection of the plea offer in determining whether a specific performance remedy is appropriate on the facts of the case. *See Blaylock*, 20 F.3d at 1468-69. Where the court concludes that the prosecutor would have withdrawn the plea or the trial court would have rejected it, then the court will decline to award specific performance. *See Riggs v. Fairman*, 178 F. Supp. 2d 1141, 1153 (C.D. Cal. 2001), *aff'd*, 399 F.3d 1179 (9th Cir. 2005). Indeed, if there is a sufficient evidentiary basis for concluding that the plea would not have been consummated for these reasons—more than just rank speculation of the "anything could happen" variety—there would not even be the underlying prejudice necessary to establish the violation. The question of remedy would be irrelevant.

2. The United States also argues that specific performance is inappropriate because the "mutuality of advantage" underpinning the original plea offer—that is, the incentives that led the prosecution to offer the plea in the first instance, such as the opportunity to secure the defendant's cooperation against a codefendant or the ability to avoid a trial—may no longer be present at the time the ineffective-assistance claim is adjudicated, and thus specific performance of the plea could result in a windfall for the defendant. *Lafler* U.S. Br. at 29. But again the United States fails to recognize that courts do consider changed circumstances when evaluating whether to fashion a specific performance remedy. *See United States v. Day*, 969 F.2d 39, 47 (3d Cir. 1992) (in fashioning appropriate remedy, court could consider "any legitimate (nonvindictive) reasons why

the prosecution may no longer favor the plea agreement"). To be sure, changed circumstances might countenance against reinstatement of a plea offer in a particular case, but it does not follow from this that "the relief of 'specific performance' of a plea bargain is *never* appropriate." *Id.*

3. The United States' argument that specific performance remedies violate separation-of-powers principles also misses the mark. *See Lafler* U.S. Br. at 30-31 & n.16; *Frye* U.S. Br. at 30-31 & n.9; *see also Lafler* Pet. Br. at 24. First, many ineffective-assistance plea cases arise on federal habeas review of a state conviction, and, as the United States concedes, the federal habeas court is not bound by state separation-of-powers principles. Next, to the extent petitioners and their *amici* are worried about federal courts encroaching on the authority of state prosecutors, the proper course is for the federal court to grant a conditional writ of habeas, which provides the State with the option of adopting the habeas court's proposed remedy or accepting the defendant's release. *See Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) ("Federal habeas corpus practice, as reflected by the decisions of this Court, indicates that a court has broad discretion in conditioning a judgment granting habeas relief."). With a conditional writ, "the state is given various alternatives which include release of petitioner as one of the alternatives, or which provides for release of petitioner if the alternatives are not met." 39A C.J.S. *Habeas Corpus* § 373; *see, e.g.*, *Lafler* Pet. App. 42a (granting conditional writ for defendant's release unless the State reoffers the original plea); *Riggs*, 178 F. Supp. 2d at 1142 (granting conditional writ unless prisoner "brought to retrial [including new plea bargaining

phase] within ninety (90) days"). Conditional writs provide the State the option of curing the constitutional defect, but do not require it, which alleviates concerns about federal interference with state proceedings. *See Nunes v. Mueller*, 350 F.3d 1045, 1057 (9th Cir. 2003).

Additionally, even assuming that imposition of a specific performance remedy in a particular case might raise separation-of-powers concerns, that is a consideration for the reviewing court to take into account in fashioning a remedy that does not "unnecessarily infringe on competing interests." *Morrison*, 449 U.S. at 364. But again, that specific performance might not be the appropriate remedy in a particular case does not mean that is inappropriate in *every* case. *See Day*, 969 F.2d at 47.

4. The United States' concerns about the new-trial remedy fare no better. The United States contends that because respondents sought to plead guilty, "any remedy that upsets the finding of [their] guilt has nothing to do with [their] constitutional claim." *Lafler* U.S. Br. at 25. That argument misunderstands the nature of the constitutional violation. Where a trial or subsequent plea *would not have happened but for a constitutional violation*, the harsher conviction and sentence that results cannot be a constitutionally valid outcome. *Strickland*, 466 U.S. at 685. A defendant who receives vacatur of his conviction certainly is not put "in a better position than if he had never received the deficient advice." *Lafler* U.S. Br. at 25 (emphasis omitted). Rather, he is placed in the same position he occupied before his lawyer's unconstitutionally deficient performance.

5. The United States also objects that vacating

the conviction to allow the parties to resume plea negotiations is unwarranted because the parties' incentives will have changed over time. *See Lafler* U.S. Br. at 27. Perhaps so. But it is hardly clear that the incentives will change in only one direction. A new trial will create a new set of risks and incentives for *both parties* to balance, which may very well lead to new plea negotiations and a successful plea. The passage of time might diminish witness memories or availability to the benefit of some defendants in some cases, but, where the case has been to trial, both sides will also know that at least one jury found that the facts established guilt beyond a reasonable doubt. And the defendant may be concerned that a new trial will result in an even longer sentence. In short, the incentives to plead, if perhaps somewhat different, will unquestionably continue to drive the parties toward another negotiated resolution.

III. RECOGNIZING A REMEDY FOR INEFFECTIVE ASSISTANCE IN THE CONTEXT OF A FORGONE PLEA WILL NOT IMPAIR THE ADMINISTRATION OF JUSTICE

Petitioners and their *amici* raise two related concerns about the administrative implications of recognizing a remedy for ineffective assistance in the context of a forgone plea. First, they assert that it will "perversely encourage[] sandbagging." *Lafler* U.S. Br. at 29; *see also Frye* Pet. Br. at 36-37. Second, they allege that recognizing the claim would "open[] the floodgates to post-conviction litigation." *Lafler* Pet. Br. at 20; *accord* CJLF Br. at 12. Both concerns are unfounded.

A. Defendants And Defense Lawyers Will Have No Incentive To Sandbag

Missouri and the United States contend that a defendant with a colorable claim that his lawyer mishandled his plea offer might "take his chances at a fair trial and, if dissatisfied with the result, still demand and receive the benefit of the forgone plea." *Lafler* U.S. Br. at 29 (quoting *Williams v. Jones*, 571 F.3d 1086, 1094 (10th Cir. 2009) (Gorsuch, J., dissenting)). Missouri goes further, warning darkly that "shrewd defense attorney[s]" will willfully violate their ethical duties and "strategically allow a favorable plea offer to expire without communicating it to the defendant, knowing that the expired offer will act as a sort of insurance policy against worse results at trial." *Frye* Pet. Br. at 36. Those concerns are baseless.

1. Defendants who reject pleas because of ineffective assistance go to trial not to game the criminal justice system, but because they have no choice. The definition of prejudice courts have applied in the forgone-plea context confirms this point. To show prejudice, the defendant must "show that he would have accepted the plea but for counsel's advice, and that had he done so he would have received a lesser sentence." *Wanatee*, 259 F.3d at 703-04. A defendant who rejected a plea offer because he could bring an ineffective-assistance challenge if trial turned out poorly could not meet this standard. The defendant's strategic choice, not "counsel's advice," would be the reason for denying the plea. *Id.*

But perhaps the concern is that, in any case where there was plea bargaining, a defendant might assert that his lawyer failed to inform him of a fa-

vorable plea offer, regardless of what actually happened. Such claims, however, have little chance of success. Defendants alleging ineffective assistance bear the burden of proving both deficient performance and prejudice. *See Strickland*, 466 U.S. at 690, 694. Absent concrete evidence, a claim that counsel failed to inform a defendant of a plea offer is a swearing contest between the defendant and his attorney. Petitioners' own *amici* starkly demonstrate how difficult it is in practice for defendants to meet their burden under *Strickland*. *See* CJLF Br. at 12 ("of a sample of 2,384 cases, there was only one meritorious ineffective assistance claim") (citing N. King, F. Cheesman, & B. Ostrom, Final Technical Report: Habeas Litigation in U.S. District Courts 52 (2007)). It is absurd to think that defendants will commonly prevail on these claims without solid evidence of their counsel's deficient plea performance.

2. Missouri's further concern that defense lawyers will intentionally neglect to inform their clients of plea offers to create "a sort of insurance policy," *Frye* Pet. Br. at 36, is not only unfounded, but outrageous. Defense lawyers are no less devoted than prosecutors to "serv[ing] their clients and the judicial system with integrity." *Day*, 969 F.2d at 46, n.9. Pocketing a plea offer runs afoul of the American Bar Association's Model Rules of Professional Conduct, which provide: "[a] lawyer shall . . . promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required." Model Rules of Prof'l Conduct R. 1.4(a)(1) (2007). Moreover, "deliberate ineffective assistance of counsel is not only unethical, but usually bad strategy as well. . . . [B]ecause incompetent lawyers risk disciplinary action, malpractice suits,

and consequent loss of business, we refuse to presume that ineffective assistance of counsel is deliberate." *Day*, 969 F.2d at 46, n.9; *see also In re De Rycke*, 707 N.W.2d 370 (Minn. 2006) (holding that disbarment was appropriate remedy for attorney who, among other ethical violations, failed to inform clients of plea offers); *Lawyer Disciplinary Bd. v. Turgeon*, 557 S.E.2d 235 (W. Va. 2000) (imposing two-year suspension for failure to inform client of plea offer).

3. While each of these reasons belies the claim that defense counsel will deliberately engage in ineffective assistance by failing to convey a plea offer, it is also worth noting that the prosecutor himself can guard against this potential problem by placing any plea offer on the record in the case. Courts in Arizona, for example, will often hold what is known as a "*Donald* hearing" before trial to ensure that the defendant understands the State's plea offer and the consequences of trial and conviction. *See State v. Donald*, 10 P.3d 1193 (Ariz. Ct. App. 2000); *see, e.g.*, *State v. Ware*, 2011 WL 1630274, at *2 (Ariz. Ct. App. Apr. 26, 2011) (explaining pre-trial *Donald* hearing). By placing a plea offer on the record, all parties can have a sound "insurance policy" against a post-trial claim that the offer was not properly conveyed to the defendant.

B. There Will Be No Flood Of Post-Conviction Litigation

Petitioners and their *amici* also contend that recognizing ineffective assistance in the context of a forgone plea would "open[] the floodgates to post-conviction litigation." *Lafler* Pet. Br. at 20; *see also* CJLF Br. at 12. That, too, is incorrect.

1. This Court has considered—and rejected—this very argument in its two prior cases addressing ineffective assistance during plea negotiations. *See Padilla*, 130 S. Ct. at 1485; *Hill*, 474 U.S. at 58. As this Court explained, "[s]urmounting *Strickland*'s high bar is never an easy task," and "[t]here is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit." *Padilla*, 130 S. Ct. at 1485.

The Court's recognition last Term in *Padilla* that lower courts are well-equipped to consider *Strickland* claims has even more force in the context of ineffective-assistance claims based on forgone pleas because state and federal courts have been entertaining these claims for three decades. *See, e.g.*, *Commonwealth v. Napper*, 385 A.2d 521 (Pa. Super. Ct. 1978); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435 (3d Cir. 1982). Continuing to acknowledge such claims is unlikely to have a significant impact on the overall amount of post-conviction litigation in the courts.

Indeed, the recent experience in Connecticut belies any suggestion that recognizing ineffective assistance in the forgone-plea context will result in a flood of habeas litigation. In 2004, the Connecticut Appellate Court held that a defendant can establish ineffective assistance of counsel where defense counsel fails to meaningfully explain the State's plea offer, the defendant rejects the offer, and he is subsequently convicted and receives a higher sentence. *See Sanders v. Comm'r of Correction*, 851 A.2d 313 (2004). The State had offered the defendant a plea

in which he would serve a 12-year sentence for the offense to run concurrently with a nine-year sentence that had already been imposed in a separate case, but defense counsel failed to meaningfully explain the plea and the consequences of going to trial. The defendant proceeded to trial, where he was convicted and sentenced to a 25-year sentence to run consecutively to the sentence in his other case. *Id.* at 315-16. On a petition for habeas, the lower court concluded that the defendant had established ineffective assistance under *Strickland* and ordered that the defendant's sentence be reduced to reflect the plea offer pending the defendant's entry of guilty pleas in accordance with the terms of the offer. *Id.* at 316. The Connecticut Appellate Court affirmed. *Id.* at 320.

In the years since *Sanders*, the Connecticut courts have not been inundated with claims of ineffective assistance in the context of forgone pleas. *Sanders* claims have been raised in approximately twenty cases, of which Connecticut courts granted habeas relief only three times. *See H.P.T. v. Comm'r of Correction*, 14 A.3d 1047 (Conn. App. Ct. 2011); *Ebron v. Comm'r of Correction*, 992 A.2d 1200 (Conn. App. Ct.), *cert. granted on other grounds*, 995 A.2d 954 (2010); *Valle v. Warden*, 2008 WL 2313664, at *13 (Conn. Super. Ct. May 15, 2008).

2. But even if recognizing a remedy in this context would precipitate some additional litigation, that is no reason to deny defendants their Sixth Amendment right to counsel during plea negotiations, a most critical stage of the criminal trial process. Judicial administration is an important value, but "[i]t goes without saying that 'the fact that a

given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.'" *Stern v. Marshall*, 131 S. Ct. 2594, 2619 (2011) (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)); *see also Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Harlan, J., concurring in the judgment) ("[C]urrent limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.").

Moreover, to the extent any frivolous claims are raised, the habeas statutes provide a variety of mechanisms to facilitate their expedient dismissal. *See, e.g.*, 28 U.S.C. § 2255(b) (allowing for dismissal of frivolous claims without a hearing); 28 U.S.C. § 2254, Habeas Rule 4 (same).[5] But "[t]o the degree the claims are meritorious, fear that there will be many of them does not provide a compelling reason . . . to keep them from being heard." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 640 n.1 (2007) (Souter, J., dissenting).

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[5] Similarly, § 2254's limitation on second or successive petitions, 28 U.S.C. § 2254(d), and its presumption in favor of state-court fact-finding, *id.* § 2254(e)(1), minimize frivolous collateral challenges by erecting stringent procedural barriers.

CONCLUSION

For the foregoing reasons and those stated in respondents' briefs, this Court should affirm the judgments below.

Respectfully submitted,

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